(7)

Supreme Court, U.S.
FILED
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No. 99-7791

In The

Supreme Court of the United States

KESTUTIS ZADVYDAS,

Petitioner,

versus

LYNNE UNDERDOWN and
IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed January 11, 2000
Certiorari Granted October 10, 2000

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United States District Court
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Docket Entries 22, 43, 44, 52, 53, 54, 59, 63, 66

10/11/96 [22] Transcript of evidentiary hrg held bfr Mag Moore on 9/27/96 (bb) [Entry date 10/16/96]

5/14/97 [43] PROCEEDING: court reporter Vic DiGiorgio; pla's motion to review Mag's Report and Recommendation [27-1] is submitted by Judge Eldon E. Fallon (ps) [Entry date 05/19/97]

10/30/97 [44] ORDER that pla's application for writ of h/c is granted; further ordered that pla shall be released from custody of the INS upon conditions to be set by the court at a hearing on 11/12/97 at 9:00; further ordered that pla be released w/in 35 days of the hrg by Judge Eldon E. Fallon (bb) [Entry date 10/30/97] [Edit date 10/30/97]

11/21/97 [52] PROCEEDING: Reported/Recorded by Liz Spong; ; In-court hearing to determine conditions of release held 9:00 11/12/97; the INS has imposed conditions of release; counsel to submit an order reflecting conditions to the court for signature; pla to be released by 12/21/97 by Judge Eldon E. Fallon (bb) [Entry date 11/24/97]

11/25/97 [53] ORDER pursuant to order and reasons of 10/30/97 by Judge Eldon E. Fallon Date Signed: 11/24/97 (bb) [Entry date 11/25/97]

11/26/97	[54] JUDGMENT: Ordered that there be jgm in favor of pla and agst dfts, granting pla's pet for h/c relief by Judge Eldon E. Fallon (CLOSED) (bb) [Entry date 11/26/97]
12/18/97	[59] MINUTE ENTRY(12/17/97): denying Govt's motion to alter or amend judgment [51-1] by Judge Eldon E. Fallon (bb) [Entry date 12/19/97]
6/26/98	[63] Transcript of proceedings held 5/14/98 bfr Judge (bb) [Entry date 06/30/98]
11/3/99	[66] ORDER from Court of Appeals: Notice of stay of mandate by 5th Circuit pending filing of certiorari in the U.S. Supreme Court until 12/2/99 (Clerk of the 5th Circuit) (bb) [Entry date 11/04/99]

Fifth Circuit Court of Appeals
Docket Entries

6/3/98	Appellant's Brief filed by Appellant John B Z Caplinger, Appellant US Immigration. Copies of brief: 7 # of pages: 54. Date of COS: 5/26/98 Word Count: 13261. Sufficient [Y/N]: y . [97-31345] A/Pet's Brief ddl satisfied. E/Res's Brief due on 7/3/98 for Kestutis Zadvydas. (trm)
8/18/98	Appellee's Brief filed by Appellee Kestutis Zadvydas. Copies of Brief: 7 # of pages: 42. Lines of text: 1259 Date of COS: 8/18/98 Sufficient [Y/N]: y. [97-31345] E/Res's Brief ddl satisfied. Reply Brf due on 9/1/98 for US Immigration, for John B Z Caplinger. (trm)

9/14/98	Reply brief filed by Appellant John B Z Caplinger, Appellant US Immigration. Copies of Brief: 7 # of pages: 29. Word count: 6993 Date of COS: 9/8/98 Sufficient [Y/N]: y. [97-31345] Reply Brief ddl satisfied. (trm)
4/26/99	Supplemental brief filed by Appellant Lynne Underdown, Appellant US Immigration. Copies of Brief: 7 # of pages: 19. Date of COS: 4/22/99 [97-31345] A/Pet Supplemental Brief ddl satisfied. (hjg)
8/11/99	Opinion filed. Issd in T form? Y Issue Mandate due on 10/4/99. [97-31345] (rmf)
8/11/99	Judgment entered and filed. [97-31345] (rmf)
10/13/99	COURT Order filed denying petition for rehearing en banc [1410833-1] With poll (Y/N)?: n Issue Mandate due on 10/20/99. Copies to all counsel. [97-31345] (mcs)
11/2/99	CLERK Order filed granting appellee's motion to stay mandate [1432842-1] until 12/2/99 ONLY. Issue Mandate ddl updated to 12/3/99. Copies to all counsel. [97-31345] (kgl)
11/22/99	Second Motion filed by Appellee Kestutis Zadvydas to stay the mandate [1464377-1] Response/Opposition due on 12/3/99. Excess Pages? (Y/N) n [97-31345] (lbm)
12/20/99	COURT Order filed granting appellee's motion to further stay of the issuance of the mandate [1464377-1] until 1/11/00. Issue Mandate ddl updated to 1/11/00. (WG) Copies to all counsel. [97-31345] (kgl)

BEST AVAILABLE COPY

37. I have had the following excludable classes explained to me and state that I am not, except as hereinafter stated, a member of any one of the following classes of individuals excluded from the United States under the Immigration and Nationality Act: (1) persons who have had one or more attacks of insanity; (2) persons who are mentally deficient; (3) persons who are afflicted with tuberculosis in any form, leprosy, or any dangerous contagious disease; (4) a person suffering from a physical defect, disease, or disability found by the Attorney General to affect the ability of such person to earn a living, unless such person affirmatively establishes that they will not have to earn a living; (5) persons convicted of, or who admit committing, a crime involving moral turpitude, or committing acts constituting the essential elements of such a crime, with the exceptions stated in the Act; (6) persons convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were 5 years or more; (7) procurers, prostitutes or persons engaged in procuring, or persons coming to the United States solely, principally, or incidentally to engage in prostitution, procurement, or persons attempting to procure, or persons who have procured or attempted to procure or import, prostitutes or persons for the purpose of prostitution, or for any other immoral purpose; (8) persons who are or have been employed by or through or have received the proceeds of prostitution; (9) persons coming to the United States to engage in any other unlawful commercialized vice; (10) persons coming to the United States to engage in any unlawful commercialized vice; (11) persons coming to the United States to perform skilled or unskilled labor who do not meet the requirements of the Act; (12) persons likely to become public charges; (13) persons excluded from admission and deported, or persons arrested and deported, or persons failing upon departure and removal, or persons removed as alien enemies, or persons removed at Government expense, who do not have the Attorney General's permission to reapply for admission; (14) stowaways, persons procuring, or who have sought to procure, visas or other documentation, or who seek to enter the United States by fraud, or by willful misrepresentation of a material fact; (15) persons who do not possess valid unexpired immigrant visas, reentry permits, border crossing identification cards or other documentation required by the Act, and who seek admission or adjustment under another identity or nationality; (16) quota immigrants not properly documented, or who are not in admissible classification under the quota provisions of the Act; (17) persons ineligible to citizenship or draft deserters, or persons who have departed from or have remained outside the United States to evade or avoid training or service in time of war or national emergency; (18) persons convicted of a violation of any law or regulation relating to the illicit narcotic drug traffic or of any law or regulation governing commerce or manufacture of narcotic drugs as provided in the Act; (19) persons who seek admission from foreign contiguous territory or adjacent islands after arriving thereon by nonregistered or nonregistering transportation lines; (20) persons arriving to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; (21) persons who are, or at any time have been, anarchists, Communists, or other political subversives, as specified in Sec. 212 (a) (28) of the Act; (22) persons who after entering the United States probably would engage in activities prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in any other activity subversive to the national security, or engage in any activity a purpose of which is opposition to, control or overthrow of, the United States Government by force, violence or other unconstitutional means, or who, affiliate with, or participate in the activities of any organization registered or required to be registered under Sec. 7 of the Subversive Activities Control Act of 1950; (23) persons accompanying other persons ordered excluded, deported, and required to be barred from admission on mental or physical disability or infancy pursuant to Sec. 237 (a) of the Act, whose protection or guardianship is required by the persons excluded and deported; (24) persons who at any time, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law.

I have been informed concerning both the classes of excludable aliens enumerated in section 212 (a) (28) of the Immigration and Nationality Act, and the defector and other classes provided for in subparagraph (i) thereof. I hereby declare that I am not and never have been a person specified in such section, except as may be claimed under Item 38 of this application.

X ____

38. I have had the exceptions to the foregoing excludable classes explained to me and claim to be exempt from exclusion on account of membership in the class or classes listed above because:

X ____

Stasys Zobylas
(Signature of alien) (Date)

[Seal] Subscribed and sworn to before me this 21th day of for son Neatutis ..., 19 58

Vice Consul of the United States of America.

Fee No. ____
Fee stamps cancelled

U. S. DEPT. OF JUSTICE
ADMITTED
DEC 6 1966
PORT OF NEW YORK N.Y.
IMMIG. & NAT. SERVICE

(8300) UNITED STATES OF AMERICA
IMMIGRANT VISA AND ALIEN REGISTRATION

(3)

The immigrant named herein arrived in the United States at the port of FT 12583 (Dec. month, year)
and was inspected by me and admitted / deported after hearing by special inquiry officer under Section PL 703 (V-W) of the Immigration and Nationality Act.

(Immigration officer)

ACTION OF SPECIAL INQUIRY OFFICER

The immigrant named herein was (admitted) (excluded) (and no appeal taken) (and appeal taken)
under Section ____ of the Immigration and Nationality Act.

Date ____

(Immigration officer)

ACTION ON APPEAL

Admitted ____ Excluded ____ Date ____

IMMIGRANT CLASSIFICATION:

Nonquota P.L. 203, Sec. 4(a)(2) (Symbol) Quota (Symbol)

American Consulate General

at Munich, Germany

IMMIGRANT VISA NO. 78324

Issued on SEP 24 1958 (Day, month, year)

The validity of this visa expires midnight, S. T., as the end of JAN 23 1959 (Day, month, year)

Nationality (if stateless, so state, and give previous nationality) Stateless

Section 3 of the Refugee Relief Act of 1953 and
This visa is issued under Section 221 of the Immigration and Nationality Act and upon the basis of the facts stated in the application. This visa does not entitle the bearer to enter the United States if, upon arrival at a port of entry in the United States, he is found to be inadmissible under the law.

[Seal] John E. Swendling
John E. Gueguellas
Vice Consul of the United States of America.

Fee No. ____ Examined and found admissible pursuant to the Act
Fee stamps Cancelled at Munich on OCT 1 1958
Immigration Officer

Passport No. 0135133
German Heimatausweis
(Or other travel document (describe))

Issued: To Stasys Zobylas, wife and 6 children
By Coblenz, Germany
On Nov 21, 1957
Expires Nov 21, 1957

STATISTICS

PLAINTIFFS EXHIBIT 3

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE IMMIGRATION JUDGE
P.O. BOX 750
OAKDALE, LOUISIANA 71463

File: A 20 823 956

IN RE: Kestuties ZADVYDAS a/k/a Kestuties Cadards a/k/a Kestutis Zadvydes a/k/a Chris Zadvydas a/k/a Kestuties Zadwydas
RESPONDENT IN CUSTODY
REDETERMINATION PROCEEDINGS

ON BEHALF OF RESPONDENT:
Kestuties Zadvydas
5060 E. Whatley Rd.
Oakdale, LA 71463

ON BEHALF OF THE SERVICE:
Lorraine Griffin, Esq
General Attorney
Imm. & Nat. Svc
Oakdale, LA 71463

MEMORANDUM DECISION
OF THE IMMIGRATION JUDGE

The respondent is a male, native and citizen of Germany who entered the United States on December 6, 1956. At that time he was admitted as an immigrant.

The Service determined that the respondent must be detained without bond pursuant to section 242(a)(2) of the Immigration and Nationality Act on the ground that he is an alien convicted of an aggravated felony as defined in section 101(a)(43) of the Act. The respondent requested a redetermination of his custody status and a bond redetermination hearing was held on February 28, 1994.

At that hearing, it was determined that the respondent was convicted on August 17, 1992 of possession of

cocaine with intent to distribute in the state of Virginia. This offense is an aggravated felony.

As an alien convicted of an aggravated felony, the respondent's bond proceedings are governed by section 242(a)(2) of the Act. Section 242(a)(2)(B) of the Act provides as follows:

> (B) The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

In bond proceedings governed by section 242(a)(2)(B) of the Act, the respondent bears the burden of showing that he is lawfully admitted to the United States, not a threat to the community, and likely to appear at any scheduled hearings; *Matter of Ellis*, Interim Decision 3197 (BIA 1993).

The respondent testified that he last resided at an address he could not remember in Houston, Texas. He said that he lived there for ten years. He added that he was just visiting Virginia when he was arrested there.

The respondent testified that he is married and has one daughter born in the United States. He said his wife is a lawful permanent resident from the Dominican Republic. He said his father is deceased and his mother lives in New York. He also has three brothers and four sisters.

The respondent testified that he was last employed for two years as a manager at Coco Fashions, a clothing

store. Before that, he worked for ten years as a carpenter in New York.

Concerning his criminal record, the respondent admitted that he was convicted of the cocaine offense discussed above. He said he was sentenced to 16 years of which six were suspended. He said he served two years of the sentence. He said he was also convicted in New York of attempted robbery on December 8, 1966. He said he was sentenced to six years and served five years of the sentence. He said he was also convicted of attempted burglary in New York on February 7, 1974. He could not remember his sentence or the amount of time he served. He said he was also arrested in 1964 and charged with car theft. He could not remember the disposition of the case but recalled that he spent no time in jail. The respondent testified that he has no other criminal record as an adult. He said he had a record as a juvenile including an arrest for running away from home in 1960 or 1961.

The respondent testified that he used cocaine in 1987. He said that he ceased to use it when he was arrested that same year. He added that he was in hiding from 1987 until he surrendered himself to the authorities in 1992. He said he did not use drugs during that time. He said that during his last incarceration he attended a three month drug rehabilitation program and also worked on his GED.

On cross-examination by counsel for the Service, the respondent admitted an additional arrest by the FBI for flight to avoid prosecution. He said the charges were dismissed. He also admitted that he had failed to appear three times on the burglary charge in the 1970's. Counsel also stated that the Service file showed a conviction for

trespass in 1975 but the respondent could not recall it. The respondent also admitted that he had been in deportation proceedings previously. He said he was released from the custody of the Service. Counsel stated that the Service file reflected that the deportation case had been remanded to the District Director to consider the respondent's application for a 212(c) waiver but no disposition was shown.

In the instant case, the parties do not dispute that the respondent is a lawfully admitted alien. Therefore, the only issues are whether the respondent has demonstrated that he is not a threat to the community and is likely to appear for future hearings. It is not really necessary to decide the first issue for his five year flight from prosecution and the information brought out by the Service on cross-examination casts serious doubt on the respondent's likelihood to appear at future hearings. Since the respondent has failed to overcome the presumption against his release, it is necessary to make the following order.

ORDER: IT IS ORDERED that the requested change in bond be DENIED.

Date: Mar. 14, 1994 /s/ Charles A. Wiegand, III
Oakdale, LA Immigration Judge

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A20 823 956 Oakdale Date: APR-8 1994
In re: KESTUTIES ZADVYDAS –
IN BOND PROCEEDINGS PURSUANT TO
8 C.F.R. § 242.2(d) – APPEAL
ON BEHALF OF RESPONDENT: Pro Se
ON BEHALF OF SERVICE: Lorraine L. Griffin
General Attorney

APPLICATION: Reduction in the amount of bond

ORDER:

PER CURIAM. The decision of the immigration judge dated February 28, 1994, in a bond redetermination hearing, in which the lawful permanent resident respondent was denied a change in status from detention in the custody of the Immigration and Naturalization Service, is affirmed. We have applied *De La Cruz* standards in our review which require the examination of factors relating to whether the respondent is a threat to the community and is likely to appear for any scheduled hearing. *Matter of De La Cruz*, Interim Decision 3155 (BIA 1991). We affirm the immigration judge's finding that the respondent failed to rebut the presumption against his release. *Matter of Ellis*, Interim Decision 3197 (BIA 1993); *Matter of De La Cruz*, supra. The respondent's appeal, accordingly, is dismissed.

/s/
Acting Chairman

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LOUISIANA

[TITLE OMITTED IN PRINTING]

CHARGES: Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act; an alien convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct

Section 241(a)(2)(B)(i) of the Immigration and Nationality Act; an alien convicted of a violation of any law or regulation relating to a controlled substance

Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act; an alien convicted of an aggravated felony

APPLICATION: A waiver under section 212(c) of the Immigration and Nationality Act

IN BEHALF OF THE RESPONDENT:
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BOP# 04977-265
5060 E. Whatley Rd.
Oakdale, LA 71463

IN BEHALF OF THE SERVICE:
Joyce L. Richard
General Attorney
Imm. & Nat. Svc.
Oakdale, la 71463

ORDER OF THE IMMIGRATION JUDGE

The respondent is a 45 year old male native and citizen of Germany who entered the United States as an immigrant on December 6, 1956. On December 8, 1966, he was convicted in the state of New York of the offense of attempted robbery. On February 7, 1974, he was convicted in the state of New York of the offense of

attempted burglary. On August 17, 1992, he was convicted in the state of Virginia of the offense of possession of cocaine with intent to distribute.

At a hearing on the issue of deportability, conducted on March 29, 1994, the respondent declined the assistance of counsel and elected to proceed pro se. He admitted all of the allegations of fact contained in the Order to Show Cause and was found to be deportable as charged.

As relief from deportation, the respondent applied for waiver under section 212(c) of the Act. Since the respondent entered the United States so long ago, his eligibility for registry under section 249 of the Act was also considered. In order to qualify for registry under section 249 of the Act, an alien must establish that he entered the United States prior to January 1, 1972, has had his residence in the United States continuously since entry, is a person of good moral character, is not ineligible to citizenship as the term is defined in section 101(a)(19) of the Act, is not inadmissible under section 212(a) of the Act as it relates to criminals, procurers and other immoral persons, subversives, narcotics law violators, and smugglers of aliens. He must also establish that he merits a favorable exercise of discretion.

The concept of good moral character is discussed in section 101(f) of the Act. Section 101(f)(8) of the Act, as amended by the Immigration Act of 1990, provides that a person who has been convicted of an aggravated felony cannot demonstrate good moral character even if the conviction took place outside the statutory period. Since

the respondent has been convicted of an aggravated felony after November 29, 1990, he cannot demonstrate the good moral character necessary for registry.

At the hearing on the application for relief, conducted on April 26, 1994, the respondent testified that he was married in 1982 to a lawful permanent resident from the Dominican Republic. He and his wife have a 13 year old daughter who resides with his wife. His wife and daughter live in Houston, Texas. The respondent testified that his mother resides in New York. His two sisters and three brothers all live in the New York area. The respondent testified that he has no relatives in his native country. The respondent testified that he entered the United States on December 6, 1956. He was then eight years of age. He said he has not left the United States since entry and no longer speaks German except for a few words and phrases.

The possibility that the respondent had derived United States citizenship was also explored. His mother and father were both aliens but his mother later remarried. She became a citizen of the United States by naturalization but did so when the respondent was over the age of 18. Therefore, he did not derive United States citizenship.

The respondent testified concerning his employment history. He said that all of the jobs listed on the application for relief were "off the books" and he paid no income tax on his earnings.

He said that his wife is employed by her brother, the owner of Coco Fashions in Houston, Texas. He said her gross salary is $325 a week and added that she has been

struggling financially during his absence from the family. He testified that he remains close to his wife and daughter and speaks to them daily by telephone.

By reference to Exhibits 3, 4, 5 and 7 as well as through the respondent's testimony, it was determined that the respondent has the following criminal history. He was first-arrested on June 25, 1966 and charged with robbery and several other crimes. He said he was convicted and sentenced to six years in prison of which he served five years. He was paroled on June 18, 1971 and then taken into custody by the Service. The respondent testified that he was held for a week, saw an Immigration Judge during that time, and then released. He said he never returned for a future hearing.

The respondent was next arrested on August 31, 1973 and charged with auto theft. He was convicted on his plea of guilty and sentenced only to the time he had served awaiting trial. His next arrest was on November 14, 1973 when he was charged with burglary. He entered a plea of guilty on March 7, 1974 and was sentenced to a period of incarceration of between one and a half to three years. During the pendency of that case, he was again arrested for burglary. That charge resulted in a conviction and a sentence of one year which he served concurrently with the sentence imposed on March 7, 1974. During this period of incarceration, the respondent was several days late returning from a furlough or a work release program. This took place in September 1976. The prison authorities viewed it as an escape but the respondent said it was not that serious. He was punished for the incident. The respondent was released from prison on July 7, 1977.

The respondent testified that he began using cocaine in 1987. He said used it every day for about seven months. During a trip to visit relatives Virginia he wanted to buy some cocaine but had no money. He agreed to deliver a package of cocaine in exchange for some cocaine for his own use. He was arrested and charged with possession of cocaine with intent to distribute. The respondent testified that he fled from Virginia to avoid these charges and returned to Houston, Texas where he ceased his use of cocaine. The respondent testified that in 1992 he turned himself in to the police in Houston, was returned to Virginia, and convicted of the charges pending there. He was sentenced to 16 years in prison of which six years were suspended. The respondent testified that he served two years of this sentence and was released on parole in January 1994 when he was again taken into custody by the Service. He added that he will be on parole until 1997.

The respondent testified that during his last incarceration he worked on his GED and also took a three month drug awareness program. Although he had abandoned the use of drugs, he thought the course would be worthwhile.

On cross-examination by counsel for the Service, the respondent discussed the deportation proceeding in 1977. Although the respondent recalls being released from the custody of the Service without conditions, Group Exhibit #8 shows that he was released on his own recognizance. Among the conditions imposed upon him were that he not change his place of residence from New York City without first obtaining Service permission, that he report any change of address or employment to the Service, and

that he report in person to the Service office in New York on August 31, 1977. The record also reflects that the respondent's deportation case was remanded to the Service by the Immigration Judge for adjudication of an application for a 212(c) waiver, that the application was denied by the Service on February 10, 1982, that the deportation hearing was rescheduled for August 25, 1982, and that the respondent failed to appear for that hearing.

Section 212(c) of the Immigration and Nationality Act provides that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under an order of deportation, who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted to the United States in the discretion of the Attorney General without regard to the grounds for exclusion contained in section 212(a) other than sections 212(a)(3) and 212(a)(9)(C). Section 212(c) does not provide a waiver to all aliens who merely demonstrate statutory eligibility of lawful permanent residence and seven years' domicile. The alien bears the burden of demonstrating that his application merits a favorable exercise of discretion; *Matter of Marin*, 16 I&N Dec. 581 (BIA 1978). The Immigration Judge is required to balance the adverse factors of record evidencing an alien's undesirability as a permanent resident against the favorable factors and social and humane considerations to determine if the granting of relief is in the best interest of the United States. Among the negative factors to be considered are the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its

nature, recency, seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (such as affidavits from family, friends, and responsible community representatives); *Matter of Marin, supra; Matter of Salmon,* 16 I&N Dec. 734 (BIA 1978); *Matter of Khalik,* 17 I&N Dec. 518 (BIA 1980).

The equities that an applicant for section 212(c) relief must bring forward to establish that favorable discretionary action is warranted will depend in each case on the nature and circumstances of the ground of exclusion sought waived and on the presence of any additional adverse factors. As the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some cases may have to involve unusual or outstanding equities. Such a showing at times may be required solely by virtue of the circumstances and nature of the exclusion ground sought waived; *Matter of Marin, supra.* In a case involving a criminal conviction, the gravity of the offense must be examined; *Matter of Buscemi,* 19 I&N

Dec. 628 (BIA 1988). The necessity of demonstrating unusual or outstanding equities may be required by the presence of a conviction of a single serious crime such as an offense involving controlled substances, or it may be required because of a succession of criminal acts which together establish a pattern of serious criminal misconduct; *Id.* An alien who demonstrates unusual or outstanding equities when required merely satisfies the threshold test for having a favorable exercise of discretion considered in his case. Such a showing does not compel that discretion be exercised in his favor, *Id.* In some cases, the seriousness of the crime may still not be overcome by the equities demonstrated, even though the equities are unusual or outstanding; *Matter of Roberts,* Interim Decision 3148 (BIA 1991); *Matter of Buscemi, supra.*

Aliens who have been convicted of a crime should make a showing of rehabilitation before relief under section 212(c) will be considered as a matter of discretion; *Matter of Marin, supra; Matter of Buscemi, supra.* However, rehabilitation is only one factor to be considered and should not be viewed as an absolute prerequisite to a favorable exercise of discretion; *Matter of Edwards,* Interim Decision 3134 (BIA 1990).

Aliens who are incarcerated or who have recent convictions have a more difficult burden than those whose criminal activity is in the more distant past; *Matter of Marin, supra.*

In the instant case, the respondent's conviction for possession of cocaine with intent to deliver is a serious adverse factor in the exercise of discretion which may be overcome, if at all, only by a showing of outstanding or

unusual equities. His other convictions are additional adverse factors in the exercise of discretion and it is incumbent upon him to demonstrate countervailing equities.

The respondent has demonstrated family ties in the United States in the form of his mother, five siblings, a wife, and a daughter. Considering the fact that the respondent has no family in Germany, this is an outstanding equity.

The respondent has resided in the United States for over 37 years and was only eight years old at the time of his entry. This equity is diminished by his criminal history which began in June of 1966 and spans 27 of his 37 years of residence. For most of the last 27 years, he has been either engaged in criminal activity, in prison, or a fugitive.

The respondent's family may suffer emotional hardship if the respondent is separated from them by deportation. This would not be beyond the hardship to be suffered by the family of any deportee. In this regard, I note that none of the respondent's relatives testified in his behalf or even provided affidavits. This causes me to question the strength of his relationship with his family members. Assuming for the sake of argument that he has a close relationship with his relatives in the United States, the emotional hardship to his daughter would be greatest for she would be forced to grow up without a father if her mother does not choose to join the respondent in Germany. However, this would not be a unique situation for her. She has been previously separated from the respondent due to his incarceration. Financially, the child's

needs have been met by her mother and there is no indication that this situation will not continue.

The hardship that deportation would cause the respondent would be great. In fact, it would be extreme hardship for he has resided in the United States for over 37 years, has not been back to Germany during all of that time, has no family ties in his native country, and does not speak the German language. This hardship is the respondent's principal equity and it rises to the level of outstanding or unusual.

Considering the length and severity of the respondent's criminal history, rehabilitation is an important factor in this case. In this regard, the respondent points to the fact that, except for his last conviction, he has been convicted of no crimes since his release from prison in 1977. He also argues that he rid himself of the use of drugs following his arrest in 1987, took a drug awareness course during his last period of incarceration, and surrendered himself to the authorities in 1992. While the respondent may be making strides toward rehabilitation, I take notice of the fact that he absconded during the pendency of deportation proceedings in 1973, abused the privilege of a supervised release from prison in 1976, fled to avoid prosecution in 1987, and was a fugitive from justice from 1987 until 1992. He also minimized in his testimony his participation in the drug-trafficking scheme. In weighing all of the facts regarding the issue of rehabilitation, I cannot make a conclusive finding that a positive showing of genuine rehabilitation has been made.

The respondent has demonstrated many positive equities in his favor. Not the least of these is his long residence in the United States and the extreme hardship that he would suffer if he is deported. Some of his equities rise to the level of outstanding or unusual.

Weighing against a grant of relief are extremely serious negative factors such as the respondent's criminal history which extends over a period of almost 28 years and includes burglaries, thefts, and armed robberies, his abuse of drugs, his distribution of drugs, his flights to avoid prosecution and prison, and his questionable rehabilitation. This is a case like *Matter of Roberts, supra* and *Matter of Buscemi, supra,* in which a favorable exercise of discretion is not warranted in spite of a showing of outstanding or unusual equities.

ORDER: It is ordered that the respondent's application for a waiver under section 212(c) of the Act be denied.

It is further ordered that the respondent be deported from the United States to Germany on the charges contained in the Order to Show Cause.

May 2, 1994
Date
Oakdale, LA

/s/
Charles A. Wiegand, III
Immigration Judge

U.S. Department of Justice
Immigration and Naturalization Service

[SEAL]

P.O. Box 5095
207 East 5th Avenue
Oakdale, LA 71463-5095

July 26, 1994

Consulate General of Lithuania
Attn: Consul General
420 – 5th Avenue
New York, NY 10018

RE: ZADVYDAS, Kestuties
A20 823 956

Dear Sir/Madam:

Please accept this letter with enclosed documents as a formal request for a travel document on behalf of Kestuties Zadvydas, a native and citizen of Lithuania.

Mr. Zadvydas entered the United States at New York, New York, on December 6, 1956 as an immigrant.

Mr. Zadvydas was convicted in Supreme Court, Queens County, New York on August 17, 1992 for possession with intent to distribute cocaine. Mr. Zadvydas was sentenced to a term of 16 years and is presently in our custody.

Mr. Zadvydas was afforded a hearing before an Immigration Judge on May 2, 1994 to answer the charge on the attached Order to Show Cause. As a result of his hearing, Mr. Zadvydas was ordered deported from the United States as documented by the attached order of the Immigration Judge.

Mr. Zadvydas will be scheduled to depart the United States upon receipt of a travel document.

If we may be of further assistance to you in this matter, please feel free to contact Officer Kipp at the above address.

Sincerely,

Nancy L. Hooks
Officer in Charge
attachments

CONSULATE GENERAL OF THE
REPUBLIC OF LITHUANIA
Lietuvos Respublikos Generalinis konsulates

420 FIFTH AVENUE **TEL: 212 354-7840**
NEW YORK, NY 10018 **FAX: 212 354-7911**

August 22, 1994
03-06-161

Ms. Nancy L. Hooks
Immigration and Naturalization Service
New Orleans District
P.O. Box 5095
207 East 5th Avenue
Oakdale, LA 71463-5095

Dear Ms. Hooks,

Thank you for your letter dated July 26, 1994, regarding deportation of Mr. Kestuties Zadvydas.

Please be advised that Consulate General can not issue a travel document to Mr. Zadvydas since he is neither citizen nor permanent resident of the Republic of Lithuania.

If you have questions or need additional information, do not hesitate to call me at (212) 354-7840.

Sincerely,

/s/ Darius Gaidys
Darius Gaidys
Consul

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
OAKDALE, LOUISIANA

A20-823-956
IN THE MATTER OF:
Kestuties ZADVYDAS
RESPONDENT IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(2)(A)(ii) of the Immigration and Nationality Act of 1990 – Convicted of Two Crimes Involving Moral Turpitude Not Arising Out of a Single Scheme of Criminal Misconduct Section 241(a)(2)(B)(i) of the Immigration and Nationality Act of 1990 – Controled Substance Violation
Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act of 1990 – Convicted of an Aggravated Felony

APPLICATION: Motion to Reopen
Deportation Proceedings

ON BEHALF OF THE RESPONDENT:
Rickey A. Watson
6907 Beechnut
Houston, TX 77074

ON BEHALF OF THE SERVICE:
Joyce L. Richard
INS General Attorney
P.O. Box 5096
Oakdale, LA 71463

ORDER OF THE IMMIGRATION JUDGE

The respondent is a forty-six year old male who is a native and citizen of Germany. He entered the United States as an immigrant on December 6, 1956. On December 8, 1966, the respondent was convicted in the state of New York for the offense of attempted robbery. On February 7, 1974, he was convicted in the state of New York for

the offense of attempted burglary. On August 17, 1992, he was convicted in the state of Virginia for the offense of possession of cocaine with intent to distribute.

On January 24, 1994, the Service issued an Order to Show Cause, charging the respondent as deportable under INA sections 241(a)(2)(A)(ii), Convicted of Two Crimes Involving Moral Turpitude Not Arising Out of a Single Scheme of Criminal Misconduct, 241(a)(2)(B)(i), Controlled Substance Violation and 241(a)(2)(A)(iii), Convicted of an Aggravated Felony.

A hearing concerning the issue of deportability was conducted on March 29, 1994. The respondent admitted to all the allegations in the Order to Show Cause, and he was found deportable. The respondent applied for a waiver of deportation under INA section 212(c). During his relief hearing on April 26, 1994, this Court considered whether the respondent should be granted a section 212(c) waiver as a matter of discretion, whether he was statutorily eligible for registry under INA section 249 and whether he had derived citizenship.

After hearing the facts of the case and reviewing the applicable law, the Court concluded that the respondent was not eligible for registry and he was not a United States citizen. On May 2, 1994, the Court issued a written order denying the respondent's application for a waiver under section 212(c) and ordering him deported to Germany. There is no indication that the respondent filed an appeal. Therefore, the order of deportation is administratively final. *See* 8 C.F.R. section 243.1 (1994).

On January 9, 1995, the respondent, through his counsel, filed a motion to reopen deportation proceedings. The respondent bases his motion on the grounds that he is eligible for a waiver of deportation because he has resided in this country for over twenty years, he has been married to a lawful permanent resident for over eight years and he is the father of a United States citizen. The Service opposes the motion.

Motions to reopen deportation proceedings are governed by 8 C.F.R. sections 3.23(b), 103.5 and 242.22 (1994). In order for a motion to reopen to be granted, the alien must state new facts that he intends to establish, supported by affidavits or other evidentiary materials and why these facts were not initially available. *INS v. Wang*, 450 U.S. 139, 140-41 (1981) (per curiam); *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136, 139 (BIA 1983, A.G. 1984); 8 C.F.R. section 103.5 (1994). The motion must also make a *prima facie* showing that the alien is eligible for the relief sought in the reopened proceedings. *INS v. Abudu*, 485 U.S. 94, 97 (1988); *Wang, supra*, 450 U.S. at 141.

In the present case, the respondent's motion fails on both procedural and substantive grounds. Pursuant to 8 C.F.R. section 3.23(b)(1) (1994), "Any motion to reopen for the purpose of acting upon an application for relief must be accompanied by the appropriate application for relief and all supporting documents." The respondent is requesting relief under section 212(c), but he failed to include a relief application. Thus, the motion to reopen fails on procedural grounds.

With respect to the substantive grounds, the respondent cannot make a *prima facie* showing of eligibility. Relief under section 212(c) is only available to lawful permanent residents. *See* INA section 212(c). An alien is no longer a lawful permanent resident once a final administrative order of deportation has been entered against him. *Rivera v. INS*, 810 F.2d 540, 541 (5th Cir. 1987); *Matter of Cerna*, Int. Dec. 3161 (1991). In the instant case, the respondent was ordered deported and he did not file an appeal. Thus, the order is administratively final. Therefore, the respondent is no longer a lawful permanent resident and is ineligible for section 212(c) relief.

For all the foregoing reasons, the motion to reopen will be denied.

ORDER: It is ordered that the respondent's motion to reopen deportation proceedings be DENIED.

/Jan. 19, 1995	/s/
Date	Charles A, Wiegand,
Oakdale, LA	Immigration Judge

Memorandum

U.S. DEPARTMENT OF JUSTICE [SEAL]
Immigration and Naturalization
Service
Southern Region

Subject:
ZADVYDAS, Kestuties
A20 823 956
COB: Germany/Lithuania
DOB: 11/21/48

Date
February 1, 1995

To
John B. Z. Caplinger
District Director
New Orleans, LA

From
Michael J. Kipp
Deportation Officer
Oakdale, LA

Thru Official Channels.[1]

Subject above claims to be a citizen of Germany and or Lithuania. Subject entered the United States on December 6, 1956 through New York City as an immigrant. Subject has the following convictions:

1) 12/08/66 convicted of attempted robbery – sentenced to 6 years.

2) 02/07/74 convicted of attempted burglary – sentenced to 3 years.

---

[1] Handwritten in original.

3) 08/17/92 convicted of possession with intent to distribute a controlled substance – sentenced to 16 years.

Subject Zadvydas was charged with 2 CIMT's and violation of a controlled substance, which makes him an aggravated felon.

Subject Zadvydas requested 212(c) relief which was denied and he was ordered deported to Germany on May 2, 1994. On January 9, 1995 Mr. Zadvydas filed a motion to reopen deportation proceeding. It was denied on January 19, 1995.

Numerous attempts have been made to obtain a travel document for subject Zadvydas without success. The following requests were made.

1) 05/05/94 request for t/d sent to German Consulate.

2) 05/22/94 request refused by Germany.

3) 07/26/94 request for t/d made to Lithuanian Consulate.

4) 08/22/94 Lithuanian Consulate refused to issue a travel document.

5) 06/14/94 German Consulate requested additional documents, which were sent to them.

6) 06/28/94 German Consulate again refused to issue a travel document.

7) 07/21/94 letters of assistance to Interpol to obtain a travel document were without success.

8) 10/03/94 Joan C. Higgins requested a travel document from the Lithuanian Consulate without success.

9) 10/14/94 State Department advised they still cannot obtain a travel document.

10) 01/24/95 second travel document request sent *to German Consulate.*[2]

Subject Zadvydas is an aggravated felon requesting release.

[2] Handwritten in original.

Generalkonsulat
der Bundesrepublik
Deutschland
Consulate General
of the Federal
Republic of Germany
Reference: RK 515/513 SE
ZADVYDAS, Kestuties hi jm
(When answering please quote)

Houston, April 6, 1995

U.S. Department of State
Immigration and Naturalization Service
P.O. Box 5095
207 East 5th Avenue
Oakdale, La. 71463-5095

Attn: Nancy L. Hooks
Officer in Charge

Re: ZADVYDAS, Kestuties, A 20 823 956

Dear Mrs. Hooks,

Thank you for your letter dated March 21, 1995.

Referring to your aforementioned letter I would like to ask you to provide further documentation concerning Mr. Zadvydas:

1 – birth certificate *in file*[1]

2 – registration document concerning his former domicile in Germany (*exact address* of his former domicile in Germany) None

Last address: Goeppingen, Germany, Staatl, Wornheim 5/8

[1] Handwritten in original.

3 – proof of the nationalities of his parents *unknown, should be in parents files: immigrated together*[2]

4 – proof of a former travel document (issued by which authority/country). *German Reiseausweis No#0135133*

Lost

I would also like to point out that the German citizenship law follows the principle of "jus sanguinis" not of "jus soli", that means that someone cannot get the German nationality just based on the fact that he/she was born in Germany.

So far I have not received any proof of Mr. Zadvydas being a German national.

Sincerely,

/s/ Rosemarie Hille
Rosemarie Hille
Vice Consul
(3) Documents from parents sent to [illegible] *Washington, DC*

[2] Handwritten in original.

Generalkonsulat der Bundesrepublik Deutschland
Consulate General of the Federal Republic of Germany
Reference: RK 515/531
ZADVYDAS,
[illegible]
(When answering please quote)

Houston, 12 Mai 1995

U.S. Department of State
Immigration and Naturalization Service
P.O. Box 5095
207 East 5th Avenue
Oakdale, La. 71463-5095

Re: ZADVYDAS, Kestuties, A 20 823 956

Dear Mrs. Hooks,

On the basis of the information your office provided, the German Consulate General in Houston has done extensive research on Mr. Kestuties ZADYVYDAS.

As I had already mentioned in my letter to your office, dated March 13, 1995, there was a strong indication that Mr. ZADVYDAS does not hold the German citizenship, which has now been confirmed.

Therefore he cannot obtain a German passport.

I return to you also the endorsed money order in the amount of US $7.50, since we cannot provide the document requested.

Sincerely,

/s/ Andrea Möhwald
Andrea Möhwald
Vice Consul

Government
Exhibit 34

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
(TITLE OMITTED IN PRINTING)

Excerpts from the Transcript of the Evidentiary Hearing, September 27, 1996, pp.9-16, 35, 51-63, 80-81

[p.9] Zadvydas – Direct

Q. I'm going to mark as Plaintiff-3 a document that appears to be the document that you had when you were a small – when you were a child, coming here, and at least part of that document – I think one of the documents in the record, but do you recognize that document?

A. I never seen it until I had wrote the Freedom of Information Act. That's how I got this document.

Q. Okay. And what does it indicate, as far as being stateless or not stateless or a citizen on that document?

A. Well, it's an Immigrant Visa and Alien Registration. It's got signatures on it.

Q. Okay, what does it say, as far as –

A. "Nationality" is "Stateless." "State and give your previous nationality." And it's got printed "Stateless."

Q. "Stateless," okay. And where did you come into possession of that document, to the best of your knowledge?

A. Immigration. Immigration.

THE WITNESS: (To the Court) It's Immigration documents.

THE COURT: I'll give it back.

BY MR. BARNARD:

Q. So, as far as you knew, the Immigration authorities had that document in their possession?

[p.10] Zadvydas – Direct

A. Yes, they did.

Q. And you got it from them?

A. Yes, I did, when I wrote the Freedom of Information Act.

Q. And it says you're stateless, –

A. Yes.

Q. – correct?

A. Yes.

THE COURT: I wish you'd point out to me where it says "stateless."

THE WITNESS: Excuse me?

THE COURT: I said I don't see where it says "stateless." I see where it says "German re – I' something.

THE WITNESS: I'll show it to you.

THE COURT: Or either. Mr. Barnard. Show me where it says "stateless."

MR. BARNARD: I'll find it, Judge. Let me see, Kestutis, I'll find it.

THE WITNESS: It's right there on the bottom.

MR. BARNARD: It's on the bottom, Your Honor.

THE WITNESS: On the right-hand corner.

MR. BARNARD: Just put your finger on it.

THE WITNESS: (Complies) Right here. If you read this right here (indicating), –

THE COURT: Let me read it.

THE WITNESS: Right here.

[p.11] Zadvydas – Direct

THE COURT: It's small print.

THE WITNESS: Yeah, it's small.

THE COURT: "Nationality: If stateless, so state." "Previous Nationality:" – it says "Stateless" in very small print on the right.

THE WITNESS: Stateless, stateless, yes, sir.

THE COURT: I just wanted to see it.

MR. BARNARD: That's okay.

THE WITNESS: I have a bigger one –

THE COURT: It's okay, I see it. I just wanted to make sure I see it.

MR. BARNARD: Actually, that's a clearer copy. I've got the bigger one, –

THE COURT: I see it.

MR. BARNARD: – too.

BY MR. BARNARD:

Q. Now, I'm going to show you Plaintiff's Exhibit Number 4, which is – well, I'll let you tell the Judge what

that appears to be. And I notice that it also has a marking "Government Exhibit 23," so it must have been introduced at some earlier occasion.

A. This is a letter that the Government – that they wrote to the Embassy of Lithuania, asking for my travel documents.

Q. Uh-huh. (affirmative response) And what -

[p.12] Zadvydas – Direct

A. And they wrote back saying that: We're not accepting him, because he's not a Lithuanian citizen.

Q. And what's the date of that?

A. I'm not a citizen, no permanent resident of the Republic of Lithuania.

Q. And that's Plaintiff-4. And what, exactly, is the date of that letter?

A. August 22nd, 1994.

Q. And when was the first time you saw that document?

A. When I received it from the Freedom of Information Act.

Q. Okay. And that would have come from the INS files, –

A. Yes.

Q. – to the best of your knowledge?

A. Yes, yes, that came from the INS files.

Q. So, now, that would have been after the hearing, obviously, though, right, the INS –

A. Oh, yeah. I didn't have none of these.

Q. I mean, but the date of the letter would indicate the INS came into possession of –

A. I was already deported, when I received it, –

Q. Right.

A. – when I got all this. I was already deported.

Q. Okay.

THE COURT: You mean you had been ordered deported?

THE WITNESS: Yes, sir. I had been ordered deported.

[p.13] Zadvydas – Direct

MR. BARNARD: Your Honor, unless there's some objection, before I forget, I would offer and introduce into evidence Exhibits 1 through 4, at this time.

THE COURT: I think they're already an Immigration record, from what I can read.

MR. BARNARD: Well, I don't think they object to it, but –

THE COURT: Oh, yes, sure. Is there any objection?

MS. BECNEL: No, no objection.

THE COURT: Let them be admitted. They're admitted.

BY MR. BARNARD:

Q. I'm going to show you another letter similar to Number 4, and ask you if you recognize Plaintiff's Exhibit 5?

A. It's another request. Immigration is asking for travel documents.

Q. From what country this time?

A. This is from German, the German Consulate.

Q. Okay, and what is the response?

A. It says – they don't have sufficient proof that I'm a citizen of that country and they're asking Immigration to send them more papers from them, you know, what they have on me, so they can send me travel documents.

Q. Okay, let me move on to a little different subject at this point. Mr. Zadvydas where are you housed at the moment?

[p.14] Zadvydas Direct

A. Orleans Parish Prison.

Q. And how long have you been there?

A. I arrived there October 3rd of '95.

Q. Okay, so you've been there almost exactly a year, now, correct?

A. Yes, sir.

Q. Could you please describe for the Court what your daily life is at the prison?

A. We're locked down in our cells 20 hours a day. They give us – we go to the yard once a week for two hours. The food is terrible. The mice are running around all over the place. There's no ventilation, no heat in the wintertime. Basically, we have no reading materials supplied. We have no church services over there. We have nothing over there.

Q. What about visitation with your family?

A. Visitation, they only give us a half an hour, which is through the booth, talking with a phone.

Q. A half hour how often?

A. Half an hour.

Q. How often?

A. I don't know.

Q. Once a day? Once a week?

A. I really don't know. I know that nobody gets visits over there, because most of the people that are over there are all from different states, you know.

[p.15] Zadvydas – Direct

Q. You mentioned mice. Where are the mice located?

A. They come up from the back windows, because the windows are opened right now in the summertime. They take the windows out, because –

Q. Is it air conditioned?

A. No air conditioning, and there's no heat in the wintertime over there, no heat at all.

Q. How many people are in the cell that you're locked down in?

A. Two people in the cell.

Q. So, you and one other person are in there?

A. Yes.

Q. And you're locked down 20 hours a day?

A. Twenty hours a day, just watch TV all day, that's all they give us is TV all day. That's it.

THE COURT: Is this the Old Parish Prison, –

THE WITNESS: Yes, sir.

THE COURT: – or is this one of the other facilities?

MR. BARNARD: I think it's the House of Detention.

BY MR. BARNARD:

Q. Aren't you?

A. The House of Detention. It's the jail.

Q. Anything else that you can tell us about the conditions?

A. Well, the medical, there's no medical over there.

[p.16] Zadvydas – Direct

Q. And have you had any medical problems that you've attempted to get attention for?

A. Yes, my ankle. I have an ankle injury that I have from 20, 30 years ago, you know. I asked to see a doctor.

When you put a sick call slip in, you've got to wait at least three or four weeks before they call you to even see a doctor over there.

Q. Has the doctor seen you about your ankle, though?

A. Yes, he's seen me, but he all he gave me was some Motrin or something. When I run out of those, I got to put another sick call slip in again and wait another three weeks. You can't get no – the nurse comes up there to pass out medication. She doesn't give you no aspirins, if you ask for aspirins. They tell you you've got to buy it. They sell it in the store. You have to buy aspirins in the store. You have to buy all your reading material in the Commissary. They don't supply us with nothing to read over there.

Q. Okay.

A. Like two hours – we only go to the yard once a week for two hours. Sometimes they won't even take us out. If the gym instructor is not there, he don't take us out, so we're stuck in the building the whole day doing nothing, you know.

Q. All right. Let me move on to something else, then. You've read the entire transcript that's marked as [end]

[p.35] Zadvydas Direct

A. Oh, yeah.

Q. So, he didn't think that your eventual release was going to be a danger to society?

THE COURT: I don't know about what he thought. I read the record and the record said he got 16, and suspended six; gave him 10. I read it.

THE WITNESS: Sixteen –

THE COURT: I read that.

THE WITNESS: I got suspended six years.

THE COURT: And then he got out early.

THE WITNESS: Two years.

THE COURT: He got out –

THE WITNESS: Two years.

THE COURT: – in '94, because you had a hearing in '94.

MR. BARNARD: Well, I think –

THE WITNESS: I got paroled. I got paroled.

MR. BARNARD: My point, Your Honor, is simply that one of the issues here is whether he's a danger and obviously the judge there could have kept him in jail for 40 years and didn't do it, so –

THE COURT: Well, I understand that.

MR. BARNARD: – he didn't see him as a danger. Okay, Mr. Zadvydas, the Government may have a few questions for you, if you could answer their questions.

[p.51] Zadvydas – Cross

– you had the Canadians, you had the British, they were all running these camps. There was a lot of European

countries fled after the war, and they wound up in Germany, these German DP Camps, all run by different governments, and my mother told me I was in a U.S. run government camp. I have a letter here, too, from the INS – I mean, from the German Embassy.

THE COURT: Well, look, the only thing I'm trying to, say is: And I am going to go back and let the Government take back its questioning, but this is as good – I'm looking at another letter in the record, Government Exhibit Number 34, which claims that they say, "Therefore, he cannot obtain a German passport." They denied you a passport on –

THE WITNESS: They denied me five times.

THE COURT: Yes, in 1995.

THE WITNESS: Five times. They denied me five times. They requested travel documents five times and they refused me five times and once with Lithuania, the German Consul of Lithuania also, –

THE COURT: All right, Counsel, let's go. Thank you very much.

THE WITNESS: – where my parents come from.

BY MS. BECNEL:

Q. Mr. Zadvydas, do you have any relatives in any other country, other than Germany, –

[p.52] Zadvydas – Cross

A. As far as I know –

Q. besides –

A. – my mother goes to Russia. She's got relatives. Some of her sisters on her side, she goes there once a year, maybe, as far as I know.

Q. And do you have any other documents, besides the passport, which – I mean, besides the Birth Certificate, which I'm not sure is going to clear up the issue?

A. I have –

Q. That would help effect your deportation to another country, perhaps not Germany or not Lithuania.

A. If it would help me, believe me, I'll go right now today to any country, just to get out of that place, okay. I've been there for – Immigration has been holding me now for over almost three years now, they've been trying to deport me for three years now.

MR. BARNARD: I think everybody is kind of aware of this, but I believe Lithuania was part of the Soviet Union for quite some time. Maybe –

THE WITNESS: That's why they fled, because, you know, communism, after the war, they fled and then wind up in Germany in the DP Camps. Lithuania is not the communists no more.

MR. BARNARD: No.

THE WITNESS: But, they're not accepting me, because

[p.53] Zadvydas Cross

I was born in Lithuania. I'm not a citizen of Lithuania.

I wasn't born in Lithuania, even though my parents came from Lithuania.

MR. BARNARD: Well, I'm just saying maybe Russia has a different policy.

THE COURT: I don't know.

BY MS. BECNEL:

Q. You said your mother goes back and forth to Russia. Is she visiting family in Russia?

A. On her side, that's what she tells me. She has a sister over there. She goes to Russia maybe once a year.

Q. So, perhaps, we could effect your deportation to Russia?

A. Russia won't accept me. They won't accept me. I wasn't born there.

Q. So, again, I just want to make this clear for the record: You don't have a legal basis for staying in the United States?

A. Yes.

Q. You understand that you have been found not to be a United States citizen?

A. Yes. I understand that, yes.

Q. So, it's a matter of effecting your deportation.

A. But, I don't – but, what my issue here is: I know that the Immigration will never deport me –

Q. Although they're continuing –

A. As sure as I believe that there is a God in Heaven, that's

[p.54] Zadvydas – Cross

how sure I am that Immigration will never deport me, and that would result in my lifelong incarceration. Immigration is not going to deport me to no country. Believe me, I'm willing to go to any country right now, but there is no country that's going to accept me, and I know it. German refused me, I was born in a camp. Lithuania refused me, because my parents were from there and they said I'm not a citizen. What other country is going to accept me?

Q. Well, INS is continuing to effect your deportation, –

A. Well, the INS has been trying –

Q. trying to obtain –

A. that for two years. I have another over here, a requested TD sent to the German Consulate, refused. Requested TD sent to Lithuania, refused. The German Consulate again refused. Letters of assistance to Interpol; letters of assistance to Interpol, to obtain travel documents were without success.

Q. Have you communicated with INS or –

A. JoAnn C. Higgins requested a travel document from the Lithuanian Embassy, again refused.

Q. Again, the INS is continuing to try to effect your deportation. We're just trying to find a country that will –

A. Okay. Well, see, that's just –

Q. Have you expressed to Deportation or to INS that you'd be

[p.55] Zadvydas Cross

willing to go to Russia? I don't believe that any travel documents have been tried to be obtained from Russia. From my records, I don't believe they've even tried to effect your deportation to Russia. This is the first that we're hearing of Russia.

A. But,

Q. If your mother goes to Russia and you have family in Russia, we can try to effect your deportation to Russia.

THE WITNESS: Your Honor, I really don't understand none of this, because –

THE COURT: Well, the law is to the effect, and that's why –

THE WITNESS: I know –

THE COURT: Wait, let me finish. – to the effect that once you become in the status that you are in, they have to seek – the Government has to seek to find a country for you, and I have seen cases where people have been held as long as nine years.

THE WITNESS: I know that, Your Honor.

THE COURT: And I don't know if any more than that, but I know I've seen at least one that came out of New York where Ex-Chief Judge Brown wrote the opinion – he used to be the chief judge with the Fifth Circuit; he was sitting by designation up in New York. And I'll have to go back and research it again, but I

[p.56] Zadvydas – Cross

know somebody was held at least nine years after finishing the sentence, and they couldn't do anything about it. They wrote a nice long opinion about how tough it was, but it's a legal issue, and I know it's also a constitution humanitarian-type thing that we're looking at. Nobody is – and that's what we're trying to find out, what, in fact, can be done. And I'm going to have to make a ruling. That's why we're having this hearing now, so it can be aired out, so I can really and I appreciate your answering –

THE WITNESS: I understand, Your Honor.

THE COURT: – as truthfully as you can, –

THE WITNESS: I understand, Your Honor.

THE COURT: – but we've got to try to dig into this and try to find what other options are available and whether or not the law is going to be favorable for a person situated like you, as to what we can do. And that's what we're trying to figure. I don't know yet. Go on, and answer as best you can. Put the questions to him.

MS. BECNEL: I don't have any further questions.

THE WITNESS: Well, I'd like to ask you. Can you answer me what efforts you've been making to try to deport me to a country? Have you been making any efforts since you stopped with the German Embassy and Lithuania? Did you stop –

[p.57] Zadvydas – Cross

MS. BECNEL: Again, that needs to – you need to communicate that with your deportation officer and

INS, as to your willingness to be deported to Russia, which we know of now and we've got INS sitting here. They can attempt to effect your deportation to Russia.

THE WITNESS: So, –

THE COURT: Let me say this to you all: –

THE WITNESS: – if I –

THE COURT: Just hold up one moment. – I don't know who you're going to call, but there is Government Exhibit 37, which shows – and you're correct the last effort I see here in this file is a letter coming from Director Caplinger, which is dated August 2nd, and you sent it to the Consulate General –

MR. BARNARD: What year, Your Honor?

THE COURT: 1996, August 2nd. It's Government Exhibit Number 37, where they were seeking travel documents for this man, but, again, from Germany. And, perhaps, he's correct, they haven't tried those other countries, and that's what Counsel is trying to say, they've never had the opportunity to try Russia.

A. And you – or if you know of any countries that would accept you. You keep saying you don't think anyone would accept you.

MR. BARNARD: Well, I think he testified that his

[p.58] Zadvydas – Cross

wife did try to bring him to the Dominican Republic.

THE COURT: He did say that. You're correct, Mr. Barnard. He did say that.

THE WITNESS: She tried with the Dominican Republic, because that's where my wife is from, you know, but – I don't see no other country that I can ask to be taken to. Canada, they'll say no, because it's too close to the border. Mexico, they'll say no, because it's too close to the borderline. So, what other country can I ask for?

MS. BECNEL: Canada and Mexico – any other countries, other than those, we can try to effect your deportation to those countries.

THE WITNESS: Well, then I'll say whichever country you can effect – I don't care. Choose a country, because I don't know, and I know they're not going to accept me. So, – there's no country going to accept me, I know it.

MS. BECNEL: I don't have any further questions, Your Honor.

THE COURT: Mr. Barnard.

MR. BARNARD: I'd just like some time to argue.

THE COURT: Well, I don't know if INS is going to make a presentation, other than their documents.

MR. BARNARD: Well, I'll wait until later, Your Honor.

MS. BECNEL: I don't think so.

[p.59] Zadvydas Redirect

THE COURT: Are you going to submit, based on your pleadings that you filed in the record?

MS. BECNEL: Yes, yes, Your Honor.

THE COURT: All right. Let the administrative record become a part of the record.

THE COURT: Now, I'll let you all argue on the case. Mr. Barnard, before he gets down, I want to make sure he says everything he wanted to say concerning this.

MR. BARNARD: Oh, I'm sorry; sit back down.

THE COURT: I don't know if he has anything else to say, because, you know, –

MR. BARNARD: I understand.

THE COURT: – because, you know, – I want him to say it. Because if you have something that the Court may have not asked you or your lawyer may have not asked you, sir, develop that.

* * *

REDIRECT EXAMINATION

BY MR. BARNARD

Q. The Government raised two new issues that we were sort of unaware of. They wanted to know if you would be willing to execute whatever documents for Russia and whatever documents maybe for the Dominican Republic –

A. I have no documents –

[p.60] Zadvydas – Redirect

Q. No, I'm saying, but if you would sign a form for them to check there, what are your feelings on that?

A. It doesn't matter to me, but the way I look at it, it's going to be Russia, then it's going to be this country, then this country, – how many countries do you have in this whole world? I figure it's going to go, just, from each country to each country to each country, and it's going to wind up where I'm going to be an old man when I get out. I'm 48 already.

Q. Well,

A. That is the way I look at it.

Q. – for the record, obviously you have more connections to Germany and to Lithuania –

A. Germany and Lithuania.

Q. – than Russia or the Dominican Republic.

A. Germany and Lithuania.

Q. Okay. Well, –

A. I wasn't born in Lithuania. I was born in a camp in Germany.

Q. Other than that issue, is there something else that you want to make the Judge more aware of, Mr. Zadvydas?

THE WITNESS: No, not recall, Your Honor.

THE COURT: The question – make it clearer, Mr. Barnard. Would you be willing to sign the necessary papers that would cause the INS to try to see a country for you, a

possible country for you to be deported to?

MR. BARNARD: Suppose Judge Moore gave them, like, a two month time limit –

THE WITNESS: If you gave them a time limit, Your Honor, yes.

MR. BARNARD: – or something to get a response –

THE COURT: Well, I don't know if I can give them a time limit, but I know one thing: They have to continue to make efforts to try to find a country to receive you.

THE WITNESS: I understand, Your Honor, –

THE COURT: And the latest one I see in this file was August the 2nd, 1996, –

THE WITNESS: I understand.

THE COURT: – but it went back to Germany, and I read that to you, that's Exhibit 37.

THE WITNESS: I understand, Your Honor, but they've been trying, now, for over two years to deport me to Germany or Lithuania.

THE COURT: But, Mr. Zadvydas, that's not the question. Even though you think it's a fatalistic attempt, we've got to try. But, under the law, they just can't release you. They've got to try to find somewhere for you. You know, and I understand what you're saying. You've been incarcerated, what, for two years past your –

THE WITNESS: Since '94.

[p.62] Zadvydas – Redirect

THE COURT: Okay, that's two years, then.

THE WITNESS: No, going on three years.

MR. BARNARD: Going on three, Judge.

THE COURT: Going on three? Okay.

THE WITNESS: Going on three years.

THE COURT: All right. Well, that's the question that your lawyer is putting to you: Are you willing to help them and to assist, by signing whatever documents are necessary to try to get you deported to a country, if they can find one that will accept you.

THE WITNESS: If one would accept me, of course.

THE COURT: That's what we're trying to find out.

THE WITNESS: If they would accept me, Your Honor.

THE COURT: I understand.

THE WITNESS: I mean, if they're not going to accept me, it's just a waiting game, you know. Are they going to hold me and hold me and hold me and hold me? I'm afraid I might not see my mother. She's 79 years old already. I haven't seen her since I've been locked up.

THE COURT: Yeah, I saw that in your papers. I read that in your handwritten petition. I went through that.

THE WITNESS: I don't understand none of this, because, you know, as sure I know, they will never deport me, and that will result in my lifelong incarceration. INS will never release me, so I'm condemned for the rest of my life,

[p. 63] Zadvydas – Redirect

locked up, because they say I'm an aggravated felon. The only one I aggravated was myself, nobody else.

THE COURT: I'm just looking to see if I have another question.

MS. BECNEL: Your Honor, –

THE COURT: Yes, ma'am.

MS. BECNEL: The INS has not attempted to effect his deportation to the Dominican Republic. That was done on behalf of his wife. That is something we can take up. If he's got an interest to go to the Dominican Republic, if he can provide any kind of documentation to help INS, –

THE WITNESS: I have no documentation from no country, no country at all; I'm stateless. I have no – the only documentation that I have is the German Birth Certificate that I sent to the German Embassy. I have no other documentations for no other country; none whatsoever. None. None at all. My wife is – that's the Dominican. She's my wife. I have nothing to do with that country. She was born there, not me.

THE COURT: Now, she's –

THE WITNESS: She tried –

THE COURT: – not an American citizen?

THE WITNESS: No, she's not, Your Honor. She's a permanent resident, –

THE COURT: Permanent resident, okay.

[p.80] Zadvydas Rebuttal

testimony on a limited basis.

KESTUTIS ZADVYDAS, PLAINTIFF, RESUMES STAND

* * *

REBUTTAL EXAMINATION

BY MR. BARNARD:

Q. You heard the mention made of you being interviewed and some review being made of your case. Would you just tell Judge Moore what you've experienced in the last two years, as far as being interviewed and having your case reviewed?

A. Well, since I've been – well, Oakdale, they see you over there, but since I've been in at Orleans Parish Jail, I have never talked to nobody, since I've been over there. It's almost a year now. I've talked to nobody over there.

Q. Okay, and what about reviewing your case? Do you know one way or the other if it's reviewed?

A. I have absolutely no idea.

Q. Okay. And your sister talked to an Immigration officer or somebody about –

A. In Oakdale, Louisiana.

Q. And what was she told –

A. She called up –

Q. – about you being reviewed?

A. – wanting to know my status, what my situation was, you know, what are they doing about my deportation and everything. She had a long conversation with them, and the deportation

[p.81] Zadvydas Rebuttal

officer, Mr. Kipp, his name was, he actually had my sister crying on the phone. He told my sister, "Don't even bother getting a lawyer. Your husband is going to be – your brother is going to be locked up for the rest of his life. We're never going to release him." And he also told my sister that, "How do I know he didn't murder a few people along the way?" That's exactly – I have a letter that my sister sent, a copy, a certified copy that she sent to Nancy Hooks. She sent it over there three times and the letter was refused three times. She wanted to lodge a complaint against the deportation officer in Oakdale, Louisiana.

MR. BARNARD: All right. Would you please answer the Judge's or the Government's questions they have?

THE COURT: Do you all have any cross-examination?

MS. BECNEL: I don't have any.

MS. BAKER: No.

THE COURT: All right. Thank you. (The witness is excused)

THE COURT: All right. Now, I'm going to take the matter under submission upon receipt of these supplemental briefs, which I will give you all a chance to file. They don't need to be that long. You know the issues that I need to know about. One, specifically, I want you to address is what is required to establish Mr. Zadvydas as a German national; his eligibility for bond, which we talked about,

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	)	**No. 96-0810**
Plaintiff	)	**Section L**
VERSUS	)	
IMMIGRATION AND NATURALIZATION SERVICE, et al	)	
Defendants	)	

DECLARATION

I, Charles Jean, declare under penalty of perjury the following:

1). I am the Supervisory Deportation Officer of the Immigration and Naturalization Service (INS) facility in New Orleans, Louisiana District Office. As such, I have supervisory authority over all INS activities concerning deportation in the New Orleans District.

2). I make this declaration based upon my review of the file regarding Kestutis Zadvydas (A20 823 956), hereinafter referred to as "plaintiff".

3). Plaintiff was ordered deported on May 2, 1994.

4). On or about September 9, 1995, plaintiff was transferred from Oakdale, Louisiana to Orleans Parish Prison, New Orleans, Louisiana.

5). INS has made continuing efforts to obtain travel documents for plaintiff which would enable INS to effectuate his deportation.

6). As of this date, INS has been unsuccessful in obtaining travel documentation for plaintiff.

7). Plaintiff filed a Petition for Writ of Habeas Corpus requesting release from detention.

8). On October 3, 1996, I called the Lithuanian Consulate to determine how one obtains Lithuanian citizenship.

9). I was told that if plaintiff could prove that both of his parents were born in Lithuania prior to 1940, he would be able to derive Lithuania citizenship.

10). I was told that the Consulate was aware of plaintiff's case and that as of this date, plaintiff had not provided the documentation necessary to prove that his parents were born in Lithuania prior to 1940.

11). I was further told that once this information is provided to the Consulate, it would take approximately three (3) months to verify the information and issue a travel document.

12). Plaintiff was interviewed on this date. He was not in possession of his parents' birth certificates.

13). I have ordered the INS "A" files on plaintiff's parents to determine whether they contain a birth certificate or other documentary proof of the parents place and date of birth.

14). I intend to contact plaintiff's mother. As she frequently travels to Russia, she may be able and willing to assist us in obtaining her and her former husband's birth certificate.

15). I, through counsel, will inform this Honorable Court of any further developments as they occur.

I hereby declare under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief.

10/3/96
Date

/s/ Charles Jean
CHARLES JEAN
Supervisory Deportation
Officer Immigration and
Naturalization Service

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

[SEAL]

New Orleans District Office
701 Loyola Avenue, T-8011
New Orleans, La. 70113

October 3, 1996

Consulate of Dominican Republic
611 Gravier Street, Suite 1647
New Orleans, LA 70130

RE: Kestuties ZADVYDAS
A20 823 956

Dear Sir:

Please accept this letter with enclosed documents as a formal request for a travel document on behalf of Kestuties Zadvydas a citizen of Germany. Mr. Zadvydas wife Maria Zadvydas is a native of the Dominican Republic and now resides in Houston, Texas.

Mr. Zadvydas entered the United States at New York, New York, on December 6, 1956 as an immigrant.

Mr. Zadvydas was convicted in Supreme Court, Queens County, New York on August 17, 1992 for possession with intent to distribute cocaine. Mr. Zadvydas was sentenced to a term of 16 years and is presently in the custody of the Immigration Service.

On May 2, 1994 a Immigration Judge ordered Mr. Zadvydas deported from the United States.

Mr. Zadvydas will be scheduled to depart the United States upon receipt of a travel document.

If we may be of further assistance to you in this matter, please feel free to contact the Detention and Deportation Section at (504) 589-2801.

Sincerely,

/s/ John B. Z. Caplinger
John B. Z. Caplinger
District Director

MEMORANDUM

U.S. DEPARTMENT OF JUSTICE [SEAL]
Immigration and Naturalization Service
New Orleans District Office

Subject: Kestuties ZADVYDAS (A20 823 956)
Date: OCTOBER 3, 1996
To: File
From: Yolanda Jackson
Deportation Officer/NOL

On the above date I interviewed Mr. Zadvydas. He stated that this interview was a ploy because he went to court last week and stated no one from INS has spoke with him since he has been in Orleans Parish Prison. His mother is a naturalized citizen who is stateless (she has a sister in Russia who she visits every year). He stated that his wife has contacted the Dominican Republic Consul Office and they refused to issue a travel document. A formal travel document request will be submitted to the Dominican Republic Consul.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	)	**No. 96-810**
Plaintiff	)	**SECT. L, MAG. 6**
VERSUS	)	
IMMIGRATION AND NATURALIZATION SERVICE, et al	)	
Defendants	)	

DECLARATION

I, Lynne Underdown, declare under penalty of perjury the following:

1). I am the Assistant District Director for Detention and Deportation of the Immigration and Naturalization Service (INS) facility in New Orleans, Louisiana District Office. As such, I have supervisory authority over all INS activities concerning detention and deportation in the New Orleans District.

2). I make this declaration based upon my review of the file regarding Kestutis Zadvydas (A20 823 956), hereinafter referred to as "plaintiff".

3). Plaintiff was ordered deported from the United States to Germany on May 2, 1994 by an Immigration Judge sitting in Oakdale, Louisiana.

4). Plaintiff did not appeal that decision. Instead, he filed a motion to reopen. However, that motion was denied on January 19, 1995 and no further judicial review

was sought. Therefore, the order of deportation is now final.

5). Because INS in Oakdale, Louisiana was unable to effectuate plaintiff's immediate deportation, plaintiff was moved to a long term detention facility. Consequently, plaintiff was transferred from Oakdale, Louisiana to New Orleans, Louisiana on or about September 19, 1995.

6). Orleans Parish Prison in New Orleans, Louisiana is used to house long term detainees until their deportation from the United States can be accomplished.

7). Immediately upon arrival in New Orleans, Louisiana, plaintiff's "A" file was assigned to a deportation officer who reviewed this case and assigned a callup date.

8). On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (IIRIRA). In compliance with the Transition Custody Rules contained therein, plaintiff's file reviewed to assess his releasability.

9). After considering all of the plaintiff's aggravating and mitigating factors, a determination was made not to release him because INS considers plaintiff to be a threat to society as well as a flight risk.

10). Notwithstanding the above, INS will continue its efforts to effectuate plaintiff's deportation.

11). I, through counsel, will inform this Honorable Court of any further developments as they occur.

I hereby declare under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief.

January 6, 1997
Date

/s/ Lynne Underdown
LYNNE UNDERDOWN
Assistant District Director
for Detention and
Deportation Immigration
and Naturalization Service

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	*	CIVIL ACTION
VERSUS	*	NO. 96-0810
JOHN B.Z. CAPLINGER	*	SECTION: "L"(6)

REPORT AND RECOMMENDATION

This matter was referred to the United States Magistrate Judge for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to Title 28, United States Code, Sections 636(b)(1)(B) and (C), and, as applicable, the law governing cases filed pursuant to Title 28, United States Code, Section 2241.

Upon review of the entire record and after conducting an evidentiary hearing on September 27, 1996, the magistrate judge issues this Report and Recommendation in accordance with the applicable law, thereby recommending that Kestitus Zadvydas' application for a writ of habeas corpus be DENIED.

In the instant application for habeas relief, petitioner Kestitus Zadvydas claims that the respondents have denied and continue to deny him due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution because of his continued incarceration, even though he has completed serving his sentence on a criminal conviction. Petitioner has been incarcerated for approximately thirty-six months awaiting deportation. Thus, the question presented is whether

petitioner can be detained indefinitely pending his deportation as an aggravated felon alien without violating the Due Process Clause.

Petitioner is not a native and citizen of the United States. He entered the United States on December 6, 1956, at New York, New York, as an immigrant. On December 8, 1966, petitioner was convicted in the New York Supreme Court, Queens County, on the offense of attempted robbery, third degree. On February 7, 1974, petitioner was convicted in the New York Supreme Court, Kings County, for the offense of attempted burglary, third degree. Petitioner was sentenced to one and one half to three years imprisonment. On August 17, 1992, petitioner was convicted in Circuit Court of Fairfax County, Virginia for the offense of possession of a controlled drug (cocaine) with intent to distribute. Petitioner was sentenced to serve sixteen years, with six years suspended. This drug trafficking offense is an aggravated felony.

The Immigration and Naturalization Service (INS) issued an Order to Show Cause (OSC) on July 6, 1977, charging the petitioner as deportable under Title 8; United States Code, Section 1251 (a) (4).[1] On July 13, 1977, petitioner was granted release on recognizance and allowed to remain at large pending disposition of his deportation case. Petitioner's application for relief from

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[1] This section has been redesignated and renumbered as Title 8, United States Code, Section 1251(a) (2) (A) (ii) and charges an alien as deportable at any time after entry for having been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

deportation pursuant to Title 8, United States Code, Section 1182 (c) was administratively denied due to the petitioner's past criminal history.

In July 1982 the INS notified the petitioner that his hearing before an immigration judge had been rescheduled to August 25, 1982. Petitioner failed to appear for his August 25, 1982, hearing. The INS instituted procedures to locate him. All attempts to locate the petitioner were unsuccessful until 1992 when the petitioner turned himself in to the police in Houston. Petitioner was removed to Virginia where he faced the drug charges which led to his drug trafficking conviction on August 17, 1992.

Petitioner served two years of his sentence and was released on parole in January 1994. However, he was immediately taken into custody by the INS. The INS commenced deportation proceedings against the petitioner once again by issuing a superseding OSC on January 24, 1994. The OSC charged that petitioner was deportable under Title 8, United States Code, Sections 1251 (a) (2) (A) (ii) (convicted of two crimes involving moral turpitude) 1251 (a) (2) (B) (i) (convicted of a violation of law relating to a controlled substance) and, 1251 (a) (2) (A) (iii) (convicted of an aggravated felony).

Petitioner was detained without bond based upon his conviction for an aggravated felony. A bond redetermination hearing was held before an immigration judge on February 28, 1994. The immigration judge ordered that the petitioner's request for a change in his custody status be denied and that he remain detained without bond. The

immigration judge found the petitioner could not demonstrate that he was likely to appear for future immigration hearings based on his past failure to appear in court and his flight from prosecution in Virginia. On March 10, 1994, petitioner appealed the immigration judge's decision to the Board of Immigration Appeals (BIA) . The BIA agreed with the decision of the immigration judge and dismissed the petitioner's appeal.

A hearing was conducted on March 29, 1994, regarding petitioner's deportability. Petitioner admitted all of the allegations of fact contained in the superseding OSC and was found to be deportable as charged. Seeking relief from deportation, the petitioner applied for a waiver under Title 8, United States Code, Section 1182(c) of the Immigration and Nationality Act.

The immigration judge conducted a hearing on April 26, 1994, and determined that the positive factors did not outweigh the serious negative factors in the case. The immigration judge denied petitioner's application for relief. He also ordered petitioner be deported from the United States to Germany.[2]

On May 5, 1994, the INS Officer-in-Charge (OIC) at Oakdale, Louisiana forwarded a formal Written request for a travel document to the Consulate of General of the Federal Republic of Germany (CGFRG). On May 18, 1994, the CGFRG responded by providing an application which petitioner needed to complete in order to obtain a travel document.

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[2] At the time, it was believed that petitioner was a citizen of Germany.

The INS Deportation Officer forwarded the completed application to the CGFRG on June 14, 1994. On June 28, 1994, the CGFRG determined that: (1) Petitioner was born of Lithuanian parents; (2) petitioner was not a German citizen; and, (3) no passport from Germany could be issued for petitioner.

The Oakdale OIC forwarded a formal written request for a travel document to the Consulate General of Lithuania on July 26, 1994. The Consulate General of Lithuania responded on August 22, 1994, by refusing to issue a travel document for petitioner.

On September 21, 1994, the OIC forwarded correspondence to the Immigration and Naturalization Service Headquarters in Washington, D.C. and to Interpol requesting assistance in obtaining a travel document for petitioner. In turn, the Assistant Commissioner of Detention and Deportation in Washington, D.C., on October 3, 1994, requested permission for the return of the petitioner to Lithuania.

On or about December 21, 1994, petitioner, represented by counsel, filed a motion to reopen his deportation case. On January 19, 1995, the immigration judge denied the petitioner's motion to reopen based on the petitioner's failure to provide a relief application as required by Title 8, C. F. R., Section 3.23 (b) (1) and failure to make a prima facie showing of eligibility for relief from deportation.

The OIC forwarded a second formal written request to the CGFRG for a travel document for petitioner on January 24, 1995. The OIC forwarded the third formal

written request to the CGFRG for a travel document for the petitioner on March 14, 1995.

On March 21, 1995, the OIC forwarded identity documents on the petitioner and a money order to the CGFRG in order to expedite issuance of the petitioner's travel document. The CGFRG responded by requesting further information about petitioner, his parents and former domicile in Germany.

The OIC provided written answers to the questions raised by the CGFRG. On May 12, 1995, the CGFRG wrote to the OIC stating that after extensive research it had been determined, that the petitioner does not hold German citizenship. On May 22, 1995, the CGFRG wrote that the petitioner was born in a displaced persons camp in Germany but that the camp was possibly governed by the United States. The OIC issued a fourth formal written request to the CGFRG for a travel document for the petitioner.

Positions of the Parties

The basis for petitioner's request for *habeas corpus* relief is that he is now being detained unconstitutionally or illegally, pending deportation. Originally, petitioner claimed he was entitled to a bond and release from Immigration custody because his order of deportation was issued more than six months ago, and INS has been unable to effectuate his deportation from the United States to Germany, Lithuania or any other country. Petitioner now argues in his recently filed (October 11, 1996) memorandum that he is entitled to habeas corpus relief because: (1) he never made a knowing waiver of his

constitutional rights (i.e., right to obtain counsel, right against making admissions and right to have relatives appear on his behalf at hearings); (2) his detention violates international law; (3) his detention violates principles of due process; (4) his incarceration for life violates the Eighth Amendment's prohibition against cruel and unusual punishment and, (5) Section 440 (c) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) violates his right to both substantive and procedural due process; or alternatively, Section 440(c) does not apply to petitioner because it should not be applied retroactively.

It is the position of the Immigration and Naturalization Service (INS) that it has the legal authority to detain petitioner and that he is being detained pursuant to that authority. The INS argues that petitioner's detention is statutorily authorized by the Immigration and Nationality Act and does not offend any constitutional protection applicable to petitioner. The INS also contends that Section 440(c) of the AEDPA, authorizes and further requires, that petitioner be detained during the pendency of the deportation proceedings against him.

Indefinite Detention Pending Deportation – Due Process

Petitioner claims that the Immigration and Naturalization Service (INS) is incorrect in its finding that he should not be allowed to be released on bond pending his deportation. Having reviewed the evidence submitted and the applicable law, the court finds that petitioner's continued detention is statutorily authorized and does

not constitute an abuse of the Attorney General's broad discretion in immigration matters.

At the outset, the court notes that petitioner is properly classified as a convicted aggravated felon because of his controlled substance violation. See, 8 U.S.C. § 1101(43). Petitioner does not challenge this finding.

The Immigration and Nationality Act ("INA") authorizes the Attorney General, on behalf of the Immigration and Naturalization Service, to take an alien into custody pending deportation. *See generally,* 8 U.S.C. § 1252. Section 1252 (a) (2) (A) of the Act specifically provides for the detention of aggravated convicted felons, as follows:

> The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

Paragraph (B) then provides:

> The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

The language of Section 1252 (a) (2) (A) and (B) thus contrasts with the general custody provision set forth in section 1252(a)(1) which provides that potentially deportable aliens may, in the discretion of the Attorney General, be released on bond or supervised parole. In standard bond proceedings under Section 1252 (a) (1), an alien generally should not be detained pending deportation "except on a finding that he is a threat to the national security or is a poor bail risk". *Matter of Ellis*, 1993 WL 65657 (BIA 1993). Thus in general bond proceedings, the burden falls upon the INS to establish that a petitioner should not be released on bond.

Such is clearly not the case when the alien sought to be deported is an aggravated convicted felon. In this instance, the language of Section 1252 (a) (2) (A) and (B) allots the burden of proving entitlement to bond to the petitioner. *Accord, Tran v. Caplinger*, 847 F.Supp. 469 (W.D. La. 1993) (holding that Section 1252(a)(2) creates a rebuttable presumption against the release of any alien who is convicted of an aggravated felony). *See also, Matter of Ellis, supra.*

Thus, in order to be eligible for release, petitioner must show that he is a lawfully admitted alien, that he is not a threat to the community, and that he is likely to appear at any scheduled hearings. In this case, petitioner has established that he was lawfully admitted to this country; as to the other two requirements, however, petitioner has not met his burden of proof. Considering petitioner's recidivist history and his prior episode of "bond jumping", petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.

Petitioner claims that his continued detention pending his deportation violates his right to due process. He argues that as a result of his status as a convicted aggravated felon, he could actually serve what may amount to a life sentence while he awaits deportation.

An alien's rights to remain in the United States are governed by the terms set by Congress. *See Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977) . The INS argues that 8 U.S.C. § 1252(a)(2) was enacted for the facially legitimate governmental purpose of preventing "bond jumping criminal-aliens" from further victimizing the community. As such, outside of a finding that the agency's decision to deny petitioner release on bond was made arbitrarily[3] or for a punitive purpose, the INS asserts that this court must find petitioner's continued detention constitutional. The INS' position is well taken.

The Fifth Amendment's mandate that "no person shall . . . be deprived of life, liberty or property, without due process of law" extends due process protection to persons within the territorial United States and not just to U.S. citizens. *See, Plyer v. Doe*, 457 U.S. 202, 210-12, 102 S.Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982); *Wong Wing v. United States*, 163 U.S. 228, 237-238, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896). Due process protection has both substantive and procedural aspects. Substantive due process prevents the government from engaging in conduct that "shocks the conscience", *Rochin v. California*, 342 U.S. 165,

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[3] For the reasons discussed, *infra*, relative to petitioner's eligibility for bond, the court finds that the INS has not acted arbitrarily in denying petitioner release on bond.

172, 72 S.Ct. 205, 209, 96 L.Ed.2d 183 (1952), or interferes with rights "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325-326, 58 S.Ct. 149, 152, 82 L.Ed.2d 288 (1937). Procedural due process concerns itself with guaranteeing that the government process used in denying an individual of life, liberty, or property is implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). In arguing that the length of his detention (a denial of petitioner's asserted "liberty" interest) "shocks the conscience", Zadvydas primarily attacks the substantive nature of the alleged constitutional violation.

The constitutionality of detention must be considered in light of its purpose. In evaluating the question of whether an alien's prolonged administrative detention violated due process, the Fifth Circuit has indicated that the focus must be on "whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose." *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1441 (5th Cir. 1993), citing *Schall v. Martin*, 467 U.S. 253, 268-69, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). Absent "any expression of intent to punish on the part of the government, that determination will generally turn on 'whether an alternative purpose to which (the detention) may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned (to it).' " *Id.* at 1441-42, citing *Schall*, 467 U.S. at 268-69, 104 S.Ct. at 2412.

The court's research reveals only one other case addressing the issue of whether a non-excludable alien's continued and indefinite detention pursuant to 1252 (a)

(2), as amended in 1990, constitutes punishment, thus violating due process. *See, Tran v. Caplinger*, 847 F.Supp. 469, 475-76 (W.D.La. 1993) The *Tran* court, relying on the Fifth Circuit's reasoning in *Gisbert*,[4] found that the alien's detention was not punishment which would then offend the alien's due process rights. *Id.* This court finds the reasoning applied in *Tran* persuasive.

In *Tran*, the court found that the legislative history and text of Section 1252 of the Immigration and Nationality Act indicated that the statute was clearly not intended as punishment. Rather, the purpose of the detention prescribed is to "protect the community and also to prevent aliens from absconding before deportation." *Id.* at 475. The government's interest in safeguarding the community is both legitimate and compelling. *Id.* at 474, *citing United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697 (1987). Moreover, "[d]etention in order to insure that the petitioner would not abscond also serves a legitimate governmental

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[4] In *Gisbert*, the Fifth Circuit held that the continued INS detention of an excludable alien was not punishment amounting to a violation of substantive due process as the INS' interest in protecting society from potentially dangerous aliens was a rational, non-punitive purpose for detention. *Gisbert*, 988 F.2d at 1442. *See also, Barrera-Eschavarria v. Rison*, 44 F.3d 1441 (9th Cir.), *cert. denied*, 116 S.Ct. 479, 133 L.Ed.2d 407 (1995) (holding that indefinite detention of excludable aliens did not violate substantive due process given the government's legitimate interest in protecting its citizens against criminal aliens).

interest". *Id., citing Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).[5]

Additionally, in determining that the continued detention of an alien was not an excessive means of accomplishing the government's purpose, the *Tran* court recognized the heightened interest of Congress in immigration matters[6] and noted that the INS had limited application of Section 1252(a)(2) detention to those aliens who have already been judicially determined to have committed a felony. *Id.* at 475. In *Alvarez-Mendez v. Stock*, 941 F.2d 956, 959 (9th Cir. 1991), *cert. denied sub nom., Alvarez-Mendez v. Henry*, 506 U.S. 842, 113 S.Ct. 127, 121 L.Ed.2d 82 (1992), the Ninth Circuit found that the detention of an alien was not an excessive means of accomplishing Congress' purpose of protecting society from dangerous aliens when the alien was not immediately removable from the United States. The Fifth Circuit has applied the rationale of *Alvarez-Mendez* in *Gisbert*.

The petitioner argues that resident aliens such as himself are entitled to greater protections than excludable aliens such as those in *Gisbert, supra*. Petitioner's general

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[5] *See also, Doherty v. Thornburgh*, 750 F. Supp. 131, 137 (S.D.N.Y. 1990), *affirmed*, 943 F.2d 204 (2d Cir. 1991), *cert. dismissed*, 503 U.S. 901, 112 S.Ct. 1254, 117 L.Ed.2d 485 (1992) finding that "[d]etention pending deportation is regulatory not punitive".

[6] Congressional power over immigration and naturalization matters is plenary; subject to only limited judicial review. *Fiallo*, 430 U.S. at 792, 97 S.Ct. at 1477. In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens". *Mathews*, 426 U.S. at 80, 96 S.Ct. at 1891.

assertion that excludable aliens are not entitled to the same constitutional protections given to resident aliens is accurate. *See, Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (en banc), *cert. granted, judgment affirmed*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). However, the determination of whether detention is punitive turns not on an alien's status as excludable or deportable but rather upon the governmental purpose behind the detention. *See, Gisbert*, 988 F.2d at 1441-42. Petitioner fails to explain why the government purpose served by Section 1252(a)(2) of the INA, i.e., protection of society and controlling "bond jumping", should be considered punitive for excludable aliens but not for one-time resident aliens now considered deportable as aggravated felons.

If a particular condition or restriction of detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. *Bell*, 441 U.S. at 38, 99 S.Ct. at 1874. In petitioner's case, as with the aliens in *Gisbert*, detention is mandated by virtue of the alien's inability to establish that he would not pose a continuing threat to society and would not escape from parole supervision, the same dual objective which Congress sought to obtain with the enactment of Section 1252(a)(2). This court finds no basis for drawing the distinction based on alien status which Zadvydas wishes the court to draw. Petitioner fails to show that his continued detention is punitive; thus, his substantive due process claim is without merit.

Waiver of Constitutional Rights

Petitioner claims he never made a knowing waiver of his constitutional rights (i.e., right to obtain counsel, right against making admissions and right to have relatives appear on his behalf at hearings) during his deportation proceedings which were conducted on March 29, 1994, and April 1, 1994. On May 2, 1994, the immigration judge issued his opinion ordering petitioner deported. Petitioner claims that a resident alien, as petitioner was, is entitled to the full protection of the Fifth and Fourteenth Amendments protections, relying on *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 at n.5, 73 S.Ct. 472, at n.5, 97 L.Ed.2d 576 (1953). Therefore, a resident alien cannot be expelled from this country without allowing him or her a fair hearing. *Id.* at pp. 598 & 598 at n.7. Moreover, petitioner claims that his deportation hearing did not comport with the requirements of due process and fundamental fairness.

Petitioner acknowledges that deportation proceedings are civil and not criminal in nature. However, petitioner argues that since his incarceration has resulted from the deportation proceedings then criminal law principles should apply.[7]

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[7] Petitioner likens his waiver of rights in the administrative hearing to those waived by a criminal defendant in a guilty plea. The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985) *citing North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed. 162 (1970) (other citations omitted).

Review of the INS administrative record shows that petitioner participated in his deportation proceeding knowingly, voluntarily and intelligently. In fact, petitioner was specifically told that he had a right to counsel and he was advised about the ramifications and possible consequences of his admissions as demonstrated from the colloquy between petitioner and the immigration judge as follows:

("J" Judge; "Z" = Zadvydas; "R" = Ms. Richard)

J. Now, the purposes of this hearing is to determine whether or not you may remain in the United States. During the hearing you're entitled to be represented by an attorney. If you cannot afford to hire an attorney at your own expense I do not have the authority to appoint one to represent you. However, there are lawyers in the area who have agreed to provide free legal services in certain cases and one of those

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In *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), the United States Supreme Court held that by entering a plea of guilty, a defendant waives several federal constitutional rights. *Boykin*, 395 U.S. at 243. The Fifth Circuit has consistently held that express articulation and waiver of each of these rights are not required; however, the record must show that the plea was voluntary. *Neyland v. Blackburn*, 785 F.2d 1283, 1287 (5th Cir.), *cert. denied*, 479 U.S. 930, 107 S.Ct. 399, 93 L.Ed.2d 352 (1986), *citing Brown v. Jernigan*, 622 F.2d 914, 915 (5th Cir.), *cert. denied*, 449 U.S. 958, 101 S.Ct. 368, 66 L.Ed.2d 224 (1980).

If a defendant "understands the nature of the charges against him and the consequence of his plea, yet voluntarily chooses to plead guilty, that plea should be upheld on federal review." *Diaz v. Martin*, 718 F.2d 1372, 1377 (5th Cir. 1983), *cert. denied*, 466 U.S. 976, 104 S.Ct. 2358, 80 L.Ed. 2d 830 (1984).

lawyers will represent you at little or no cost. Do you understand your right to be represented?

Z. Yes sir.

J. Very good. Would you like to postpone the hearing and have some time at which to look for a lawyer or would you prefer to speak in your own behalf and being the hearing today?

Z. Well, I really can't afford one.

J. Well did you understand what I explained about there being lawyers in the area that would represent you without paying a fee?

Z. Yes sir.

J. Would you like an opportunity to contact any of them?

Z. No sir.

J. Very well, did you receive from the immigration service a copy of the Order to Show Cause. That is the paper on which the government makes the charges about you. It would look like that paper that Ms. Richard is showing you – you did - very good. That will be received into the record as Exhibit #1. Did you also receive a list of the free legal services available in the area and the notice of your appeal record?

Z. Yes sir.

J. Very good. During the hearing which we will conduct, you are permitted to offer evidence in your behalf, to examine and object to any evidence offered by the government and if the government should call witnesses to testify in your case, you are permitted to ask questions of their witnesses. That is known as cross-examination. Do you understand these rights that I have explained?

Z. Yes sir.

J. Very good – now I will explain the charges that the government makes and ask you some questions about them. The law says that first you must take an oath to answer the questions truthfully, so I will ask you to please stand and raise your right hand to be sworn. Do you solemnly swear that the testimony you will give in this proceeding will be the truth, the whole truth and nothing but the truth, so help you God.

Z. I do.

J. Thank you. Now please be seated. Now the government alleges that you are not a citizen or national of the United States but rather a native and citizen of Germany. Is that correct?

Z. Yes sir.

J. They allege that you entered the United States through New York, New York, on December 6, 1956. Is that correct?

Z. Yes sir.

J. They allege that at that time you entered the United States as an immigrant. That is, a permanent resident or person with a green card. Is that right?

Z. Yes.

J. They also allege that on December 8, 1966, you were convicted in the state of New York for the offense of attempted robbery in the third degree. Is that correct?

Z. Yes sir.

J. OK, they next allege that on February 7, 1974, you were convicted in the State of New York for the offense of attempted burglary in the third degree. Is that correct?

Z. Yes sir.

J. And finally they allege – actually it's not finally, excuse me. The next thing that they allege is that on August 17, 1992, you were convicted in the State of Virginia for the offense of possession of a controlled drug with intent to distribute. Is that correct?

Z. Yes sir.

J. What drug was involved?

Z. Cocaine.

J. I see. And the final thing that they allege is that these crimes did not arise out of a single scheme of criminal misconduct. What they mean by that is that when you committed an offense in 1966 you did not have in mind that you would be committing another one in 1974. Is this correct?

Z. Yes sir.

J. Very good thank you for the information. Now Ms. Richard I consider all the allegations to be admitted. Is there any evidence that the service wishes to offer? Or stand on the plea?

Z. At this time (inaudible) will stand on the plea.

J. Very well – to the respondent, based upon what you've told me I find that you are subject to being deported. We'll discuss the possibility of relief from deportation in just a moment. Before we do that I want to explain to you that those within deportation proceedings are permitted to choose the country to which their deportation would be directed. If you had to be deported, to what country would you choose to go?

Z. I can't answer that your honor.

J. You may decline the designated if there is no country; I will then have to designate one for you and I will designate your native country of Germany. Now on the subject of relief of deportation, is the reason you don't choose to go to Germany simply because you've not lived there in a long time?

Z. Well I've been here since 1956 your honor and I don't know anything about Germany.

J. I understand. My point is that you don't fear that the government of Germany would persecute you in some way do you?

Z. No sir.

J. OK, then it would look like that the relief that would be available to you would be in the form of a waiver under Section 212(c) of the Immigration and Nationality Act. That could allow you to remain, of course, you also could now that I think about it, since you've been here for so long, I think you could also apply for registry if I'm not mistaken. I have to do a little research on that to see whether you're eligible for that or not. Would it be agreeable to you if we could postpone the hearing for a few days so that I could have the opportunity to check on that.

J. Very good, let me go off the record for a moment while I get a date from the clerk.

J. Back on the record now – we're going to postpone your hearing for three days – we'll have you back this Friday, April 1st at 10 in the morning. Between now and then I'll be able to check on that possibility of registry to see if that is available to you and if it is I can get the forms together for you. If it's not I'll have the forms for the 212 (c) waiver. I assume you want to apply for relief and stay if you can, right?

Z. Yes sir.

J. OK fine – then that's what we'll do. The matter will continue to April 1st and we're off the record until then.

Record Document, Transcript of Proceeding conducted on March 29 and April 1, 1994.

Further review and study of the administrative record (Transcript of Cassette Tape #1, March 29, 1994, hereinafter T.___) shows that petitioner voluntarily and knowingly rendered his admissions (T. 2-5). Petitioner and the judge discussed petitioner's family ties (T. 8-11), employment history (T. 13-15) and criminal history (T. 17-23). Study of the transcript of Cassette Tape #2 shows that the following subjects were discussed: petitioner's previous immigration detention (T. 1); petitioner's incarceration and escape (T. 2-7); petitioner's life in Houston, Texas (T. 8-10); petitioner's previous guilty pleas (T. 14); petitioner's education (T. 15-16); petitioner's family ties (T. 18); and, handwriting (T. 20).

Review of the cassette tapes and transcripts of the tapes of the deportation proceedings conclusively shows that petitioner's rights were protected. Petitioner's claim is meritless.

International Law and Eighth Amendment

Petitioner argues that "no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Petitioner argues that the United Nations' charter calls upon the United Nations to promote the protections of human rights and for its member nations to undertake joint and separate action to achieve that goal. Petitioner relies upon

Caballero v. Caplinger, 914 F.Supp. 1374, 1379 (E.D.La. 1996) citing 59 Stat. 1033, T.S. No. 993 (1945); U.N. Charter, Arts. 55 & 56.

As previously discussed, petitioner is not being arbitrarily imprisoned for an indefinite time period amounting to a life sentence.[8] The INS is continuing its efforts to deport petitioner. On October 3, 1996, the INS forwarded a formal request for a travel document on behalf of petitioner to the Dominican Republic, the native country of petitioner's wife.

The government has a legitimate interest in protecting its citizens from criminal aliens. There has been no violation of international law. The court notes that cases exist whereby aliens have been detained for longer periods than petitioner. *See, Dor v. District Director, INS*, 891 F.2d 997 (2d Cir. 1989) (five year detention); *Doherty v. Thornburg*, 943 F.2d 204 (2d Cir. 1991) (eight year detention).

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[8] The Court notes at this juncture that, according to the INS' Second Supplemental Memorandum, Zadvydas can apply for a bond redetermination pursuant to the "transition period custody rules" of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (hereinafter "IIRIRA"). These transitional rules delegate authority to the Attorney General to release certain criminal aliens, including aggravated felons who are undergoing deportation or exclusion proceedings, from INS custody on "bond". Although the INS asserts that this change in the law renders petitioner's application moot, the Court has been informed by telephone by counsel for the INS that even under the more lenient transitional rules, the INS has determined that petitioner would not be eligible for release on bond. Therefore, the Court has addressed the merits of petitioner's complaints.

To the extent that petitioner claims that his continued detention violates the Eighth Amendment, the claim has no merit. The Eighth Amendment guarantees that persons will not be subject to excessive bail and fines or cruel and unusual punishment, but does not preclude the detention of potentially dangerous aliens. *United States v. Salerno*, 481 U.S. 739, 748, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Antiterrorism and Effective Death Penalty Act of 1996 (ARDPA Pub.L. 104-132, 110 Stat. 1214 (1996)

Finally, the INS argues that petitioner is not entitled to relief under the AEDPA and further asserts that the AEDPA should apply to petitioner's case retroactively. Petitioner claims, however, that Section 440 of the AEDPA violates his right to substantive and procedural due process and, alternatively, that Section 440 should not be applied to his case retroactively.

This Court has already determined, applying pre-AEDPA law, that petitioner is not entitled to be released from INS detention. Therefore, the Court declines to address whether the AEDPA violates due process or should be applied retroactively to petitioner's case.

Accordingly,

IT IS RECOMMENDED that petitioner's application for habeas corpus relief pursuant to Title 28, United States Code, Section 2241 be DENIED.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within 10 days

after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected – to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996).

New Orleans, Louisiana, this 3rd day February, 1997.

/s/ LOUIS MOORE, JR.
United States Magistrate Judge

To whom it may concern:

I Ona Steponis, declare under penalty of perjury the following:

I am the mother of Kestutis Zadwydas. I was born in Germany, 1919. My mother and father were not German citizens. They were Lithuanians. I never derived any citizenship of either country. After World War II, my husband and I fled Lithuania to avoid prosecution by the communists. We went to Germany and were put in a DP camp. My son Kestutis was born in that camp, which at that time, was governed by the United States following World War II. My entire family and I came to the United States December 6, 1956. My status and nationality, along with my sons and daughters was stateless. When I became a nationalized citizen in 1982, it clearly states on my certificate of naturalization, "country of former nationality – STATELESS". Since I have been living here, in the United States, at 58 Van Nostrand Avenue, Great Neck, NY (for the past 25 years), not once did the INS contact me concerning my place of birth, nor my son Kestutis Zadwydas. I have sent my son documents concerning my place of birth. I hope and pray that these documents can, in some way, help him to be released so that he can be with the family again, who love and miss him very much.

/s/ Ona Steponis
Ona Steponis
58 Van Nostrand Avenue
Great Neck, NY 11024
State of New York
County of Queens: ss
Sworn to Before me this
9th day of April, 1997

/s/ Nicholas Messina
NICHOLAS MESSINA
NOTARY PUBLIC, State of New York
No. 41-7911751
Qualified in Queens County
Commission Expires Nov. 30, 1998

To whom it may concern:

I Aldona Terry Smith, formerly Aldona Terry Rios, declare under penalty of perjury the following:

I am the sister of Kestutis Zadwydas. When my brother was released on his own recognizance from the INS in 1977, he lived with me at 1663 Hancock Street, Ridgewood, NY from 1977 – 1981. During that time, I have never received a letter from the INS concerning my brother's next scheduled deportation hearing. When I moved in 1981, I notified the US Post Office of my new address, therefore, they would have forwarded any mail addressed to me to my new address at 66-67 Forest Avenue, Ridgewood, NY. During the time I resided at that address, again, I never received anything from the INS concerning my brother Kestutis Zadwydas.

/s/ Aldona Terry Smith
Aldona Terry Smith
62-22 69th Lane
Middle Village, NY 11379
State of New York
County of Queens: ss
Sworn to Before me this
9th day of April, 1997

/s/ Nicholas Messina
NICHOLAS MESSINA
NOTARY PUBLIC, State of New York
No. 41-7911751
Qualified in Queens County
Commission Expires Nov. 30, 1998

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
[SEAL]

New Orleans District Office
701 Loyola Avenue, T-8011
New Orleans, La. 70113

April 23, 1997

Darius Gaidys
Consul
Consulate General of Lithuania
420 - 5th Avenue - 3rd Floor
New York, NY 10018

Dear Mr. Gaidys:

By letter dated July 26, 1994, (copy enclosed), we requested a travel document on behalf of Kestuties Zadvydas, A20 823 956.

By letter dated August 22, 1994 (copy enclosed), you stated that the Consulate General could not issue a travel document to Mr. Zadvydas "since he is neither citizen nor permanent resident of the Republic of Lithuania."

This service understands that Mr. Zadvydas is not a permanent resident of Lithuania and has probably never resided in your country. However, the basis for the determination that Mr. Zadvydas is not a citizen of Lithuania was not explained.

As you know, Mr. Zadvydas was born at a time when most of Europe was trying to overcome the terrible ravages of war. Many families had fled or been forced from their homes and countries and many lost all of most of their property and personal belongings.

The record reflects that Mr. Zadvydas was born in Germany in 1956 of parents both of whom were citizens of Lithuania.

It would be appreciated if you would provide a copy of your country's law which sets forth how a child born in another country of Lithuanian citizen parents acquires citizenship. Surely, a child is entitled to citizenship of the country of birth or country of parents.

The Vice Consul of the Embassy of Germany has explained that citizenship of children born in Germany is determined by the citizenship of the parents, through the father only until 1975 when it was changed to either or both parents.

Mr. Zadvydas has provided additional documents obtained from his family, copies of which are enclosed. The documents appear to be a baptismal certificate relating to his mother and three statements regarding the marriage of his parents in Lithuania.

We are enclosing a new Form I-217, Information for Travel Document or Passport, which includes newly acquired information about Mr. Zadvydas. It is requested that you reconsider our request for a travel document for Mr. Zadvydas.

Your early response would be appreciated as Mr. Zadvydas is being detained. Your reply can be telefaxed to 504-589-2504. If you have any questions or need further

information concerning this case, please call me at 504-589-6521.

Sincerely,

/s/ Shirley Epperson
Shirley A. Epperson
Deputy District Director
Enclosures

Date Prepared: 04-22-97
INFORMATION FOR TRAVEL DOCUMENT OR PASSPORT

File: A 20 823 956

1) Name: ZADVYDAS, Kestuties

2) Sex: Male

3) Other Names Used or Known By: CADARDS, Kestuties

4) Citizenship: Lithuania

5) Date of Birth: 11/21/48

6) Place of Birth: Schwaebisch Gmuend, Germany

7) Height: 72"
Weight: 180
Eyes: Blue
Hair: Brn
Complexion: light
Marks or Scars: Scorpion tattoo r/arm & rose l/arm

8) Nearest Large City to Place of Birth: Munich, Germany

9) Distance and Direction of Place of Birth From This Large City: Not applicable

10) If Citizenship is Different From Country of Birth, Explain. If Naturalized In Any Country, Show Date And Place Of Naturalization, Certificate Number, And State How Citizenship Was Acquired: Lithuanian through parents both of whom were citizens of Lithuania

11) Names: Locations And Dates (Years) Of Attendance Of Foreign Schools: Came to U.S. when 8 years old with parents and siblings

12) Names, Exact Locations And Dates (Years) of Attendance of Foreign Churches, Include Date And Nature Of Any Religious Ceremony Which May Have Been Recorded: Baptism of mother – Catholic parish, Memel (now Klaipeda), Marriage of parents – Catholic parish priest in Garsdai, Lithuania

13) Last Permanent Residence In Country Of Citizenship (*Show Dates Of Residence*): None Known

14) Address In Country Of Last Foreign Residence (*Show Dates Of Residence, And Immigration Status There*): Goeppingen, Germany Staatl Wohnheim 5/8

15) Place Of Entry Into United States: New York, New York (Immigrant)

Date Of Entry Into United States: 12/6/56

16) List Date And Place Of Issuance And Number Of Passport, Birth Certificate, Baptismal Certificate Or Document Of Identity. Specify Dates Of Military Service, Country And Unit, Rank, Serial Number, And Places Of Induction And Discharge.: Immigrant visa to United States issued at Goeppinger, Germany on November 21, 1955

17) In Possession Of Travel Document Or Passport At The Time Of Entry: [ ] Yes [X] No. Describe Document(s). If Subject Did Not Have Travel Document Or Passport At Time Of Entry, Or Does Not Have Such A Document Now, Indicate Whether Ever Obtained One: [ ] Yes [ ] No. State How, When, And Where It Was Obtained: What Kind Of Document It Was, and What Became Of It.: Received immigrant visa to travel to U.S. with parents and siblings.

18) Father's Name: Stanley Zadvydas (AKA: STASYS)
Date Of Birth: May 14, 1913
Place Of Birth: Maseikial, Lithuania
Present Address: Deceased

19) Mother's Maiden Name: Ona Staponace
Date Of Birth: Oct., 30, 1919
Place of Birth: Dovilay, Lithuania-Dawillen, Memel District
Present Address: Great Neck #58 North Van Narand, Long Island, New York

20) Name, Relationship, And Address Of Relatives Abroad: N/A

21) Previously [ ] Excluded [ ] Deported [ ] Required to Depart From The United States
On Claims No. (*Date*) via _____ (*Port*) To _____ (*Country*)

22) Indicate Whether Ever Arrested, In Prison Or A Public Institution In The Country Of Which A National Subject Or Citizen: [ ] Yes [X] No. If So, Give Dates And Places: Left Europe in 1956 at age of eight.

23) Name, Nationality And Present Address Of Spouse, And Date And Place Of Marriage: Maria Zadvydas, 7445 Cook Road, Houston, Texas 77021 – (713) 561-5570

24) Names, Ages And Addresses Of All Children: Lina Zadvydas, Houston, Texas – 13 years

25) If Noncanadian Deportable To Canada, Give Date And Port Of Arrival In Canada And Name Of Vessel: N/A – Not Applicable

Form I-217 (Rev. 3977)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
(TITLE OMITTED IN PRINTING)

Excerpts from the **Transcript of Hearing before District Court Judge Fallon on May 14, 1997, pages 10-13.**

[p.10] Zadvydas – Direct

courts of the power to review agency decisions through the writ of habeas corpus except in the most narrow of circumstances.

We're not even, you know, necessarily asking the Court to review the decision, we're just reviewing his present custody. And I assume even if this Court were to rule against Mr. Zadvydas, which I'm certainly not encouraging the Court to do, that two years from now or six months from now he could come back with another writ saying that I'm being confined.

THE COURT: Okay. Let me hear from the government.

MS. BECNEL: Your Honor, as far as the travel documents, as far as his deportation being affected, we received some information from Mrs. Zadvydas. And in his father's visa application it says that both parents are citizens of Lithuania. That information has been forward to Lithuania and the prior request to Lithuania said that Mr. Zadvydas was stateless, not that the parents were citizens of Lithuania. So INS has a strong belief that he will be accepted into Lithuania. We ask for at least six to eight weeks to let the counsel in Lithuania make a decision on the new information that we provided to him. Lithuania has not sent a denial. They have not responded,

so it's INS' believe that if they had responded by now it would have – if they were going to deny it, then they would have responded by now. And if we receive the information from Houston concerning Mr. Zadvydas' wife and the Dominican Republic will not take him under any conditions, then the INS will consider a release under bond and controlled conditions. That's INS' position.

THE COURT: I understand. The problem that the Court has is that if this person had just been arrested last week, last month, the last six months, the last year, the last two years, the last three years, somewhere along the line, you can say, well, you know, these things take time. All of us know they take time. We're getting to the point where it's just taking too much time for the United States to pick up the phone and talk to somebody. Reach out and touch somebody on this issue. And I'm concerned about it. It ought to concern the Court that someone is sitting in jail and they tell them, "we're going to get around to finding you some place to stay". And I'm sure you're doing your best, but I'm having difficulty understanding why it takes three to four years to make these contacts. Let me hear a response from Mr. Zadvydas.

MR. BARNARD: Your Honor, I hate to beg the indulgence of the Court, but maybe if we remove the cuffs, Mr. Zadvydas is trying to show me documents.

THE COURT: I understand. Marshal, let's do that, please.

(The Marshal complied)

MR. BARNARD: Your Honor, to address the last issue,

[p.12] and I'm just going to touch upon it because I think the Court's heard enough about it. But his whole family came from wherever, Europe for a lack of a better term. Germany, I think was the actual physical location. They all have numbers. They all have funny names, Zadvydas. You know, I mean, the INS shouldn't have had much trouble over the last three or four years in locating the file of the mother, the father, the sisters, the brothers, you know. I just don't understand the INS' position here that they can't find in their own files documents of people who had to go through their system. It's strange, though. It's strange something. And – excuse me. Mr. Zadvydas wanted me to tell – Your Honor, there's two documents, and if I could have an evidence sticker I'll introduce them into evidence.

THE COURT: What are those documents? One of them is a document, which – our next number is 15?

THE CLERK: 14.

MR. BARNARD: It's from the German Government. It's in English. It says, "Dear Miss Hooks, thank you for your letter", and talks about various documents, and it's dated April 6, 1995. So, obviously, again, INS was making inquiries two years ago. And I offer that number 14 into evidence. And Number 15 is dated February of '95, and it talks

[p.13] about a number of different request letters of assistance to INTERPOL, Lithuanian Counsel without success.

Just various attempts, I think, by INS to gather information, I believe, is what it represents.

THE COURT: Okay.

MR. BARNARD: Was there some other issue that you wanted me to address? Oh, I'm sorry. Mr. Zadvydas wanted me to inform the Court that his sister – in one of these documents that I introduced in the magistrate judge's hearing that was held, was a checklist by the sister of how many times she's contacted congressmen and agencies, so it's in the same vein as that document. But she talks to me fairly often and she's told me and Mr. Zadvydas that she has contacted both the Lithuanian Counsel here, or whatever it's called, the Embassy, and the person that was on the earlier letters went back – I'm not exactly sure what implication, if any, that has, but whoever she spoke to, indicated to her on the phone – again this is all hearsay, but Mr. Zadvydas wanted me to convey it to the Court – that they didn't think that Lithuania was going to accept him in any event. And we also have a letter in the record saying that he's not a citizen, they won't accept him.

THE COURT: All right. Okay. I'm going to have to take this one under advisement again; and I will make this a part of the record, those two documents.

[SEAL]

U.S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

New Orleans District Office
701 Loyola Ave. Rm. T-8011
New Orleans, La 70113

June 10, 1997

Petras Anusas
Consul General
Consulate General of Lithuania
420 5th Avenue - 3rd Floor
New York, NY 10018

Dear Mr Anusas:

By letter dated April 23, 1997 (copy enclosed), this office we requested a travel document for Kestuties Zadvydas, A20 823 956.

We have recently located the Service file relating to Mr Zadvydas' father, Stasys Zadvydas. The file contains additional material which may be helpful in your determination. The visa application by Stasys Zadvydas indicates that both he and his wife were natives and citizens of Lithuania. The application indicates that the family was sponsored by United Lithuanian Relief Fund of America, Inc. A copy is enclosed for your consideration. Also enclosed are clearer copies of the documents provided with our letter dated April 23.

It is respectfully requested that you give favorable consideration to our request. It is understood that a decision may take a considerable amount of time as you may want to try to verify the parents' birth through a check of any

records which may have survived the war. It would, therefore, be appreciated if you could provide an interim response indicating that consideration is, in fact, being given to our request.

If you have any questions or need any further information, please let me know.

Your assistance in this matter is appreciated.

Sincerely,

/s/ John B.Z. Caplinger
John B.Z. Caplinger
District Director

Enclosures

OF AMERICA, INC.

DEPARTMENT OF STATE
WASHINGTON, D. C.

Budget Bureau No. 49-R139
Approval Replies [illegible]

ASSURANCE BY AN INDIVIDUAL SPONSOR WITH ENDORSEMENT BY AN ORGANIZATION RECOGNIZED BY THE ADMINISTRATOR

(For use under the Refugee Relief Act of 1953)

DO NOT WRITE IN THIS SPACE

Read Instructions on Page 4 Before Filling in Form

I, ANTANAS KAUHAS *NAME: (First) (Middle) (Last)*, residing at 103 South 4th St., Brooklyn, N.Y. *(Street and No., or R.F.D. No., City, County, State)*, sponsor the admission into the United States under the Refugee Relief Act of 1953 of one principal applicant, spouse, and children, as described below:

SECTION I – THIS SECTION FOR USE IF PRINCIPAL APPLICANT IS NAMED

(Use Section II if principal applicant is not named. Do not fill in both Sections I and II)

---

(1) Principal Applicant STASYS ZADVYDAS *NAME: (First) (Middle) (Last)*, May 14, 1913 Makeikiai, Lithuania Lithuanian (Date of birth) (Place and country of birth) (Nationality), GOEPPINGEN, Flugplatz, Staatl, Wohnheim 5/8, Germany *ADDRESS: ([illegible], or Street and No., City, Province, Country)*

(2) Spouse of principal applicant:

ONA ZADVYDAS

Oct. 30, 1919 Klaipeda Lithuania *(Date of birth) (Place and country of birth) (Nationality)*

CHILD(REN)

(3) IRENA Dec. 11, 1944 Kaulsdorf, Thueringen, Germany *NAME: (Date of birth) (Place and country of birth)*

(4) STASYS Feb. 26, 1946 Wuerzburg, Germany *NAME: (Date of birth) (Place and country of birth)*

(5) ALDONA Mar. 28, 1947 Wuerzburg, Germany *NAME: (Date of birth) (Place and country of birth)*

(6) ALGIRDAS Nov. 21, 1948 Schwab, Gmuend, Germany *NAME: (Date of birth) (Place and country of birth)*

(7) KESTUTIS Nov. 21, 1948 Schwab, Gmuend, Germany *NAME: (Date of birth) (Place and country of birth)*

(8) VYTAUTUS Dec. 30, 1951 Goeppingen, Germany *NAME: (Date of birth) (Place and country of birth)*

I am (not) related to the alien listed under (1) (2), xxxxxxxxx.

SECTION II – THIS SECTION FOR USE IF PRINCIPAL APPLICANT IS UNNAMED

Use Section I for named principal applicant. Do not fill in both Section I and II)

I desire a principal applicant who is a:

[ ] Single man within age ranges of ___ years to ___ years.

[ ] Single woman within age ranges of ___ years to ___ years.

[ ] Man and wife within age ranges of ___ years to ___ years.

VERIFIED UNDER THE REFUGEE RELIEF ACT OF 1953.

No 58009
Date OCT 23, 1955
FROM THE ADMINISTRATOR:

/s/ [Illegible]
[illegible]

United States District Court,
E.D. Louisiana.

Kestutis ZADVYDAS, Plaintiff,

v.

John B.Z. CAPLINGER and Immigration and Naturalization Service, Defendants.

Civil Action No. 96-0810.

Oct. 30, 1997.

ORDER AND REASONS

FALLON, District Judge.

Before this Court is petitioner Kestutis Zadvydas' objection to the report and recommendation of United States Magistrate Judge Louis Moore, Jr., which recommends that the petitioner's application for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, be denied. For the reasons that follow, the petitioner's objection is sustained in part, in that the Court finds that the petitioner's detention pending deportation violates his right to substantive due process, and denied in part, in that it is denied in all other respects. The petition for writ of habeas corpus is GRANTED subject to the conditions hereinafter described.

I.

BACKGROUND:

The petitioner was born on November 21, 1948 in a displaced persons' camp in a region of Germany governed by the United States following World War II. His parents were from Lithuania but it is not clear whether

either or both were ever citizens of that country.[1] In 1956, at the age of 8, petitioner was admitted to the United States in connection with a program for the relocation of displaced persons.

On December 8, 1966 petitioner was convicted in the New York Supreme Court, Queens County, of attempted robbery, third degree. On February 7, 1974 he was convicted in New York Supreme Court, Kings County, for attempted burglary, third degree.

The Immigration and Naturalization Service (INS) issued an order to show cause on July 6, 1977 charging petitioner as deportable. On July 13, 1977 petitioner was granted release on his own recognizance and allowed to remain at large pending disposition of his deportation case.

In July 1982 the INS notified petitioner that his hearing before an immigration judge had been rescheduled to August 25, 1982. He failed to appear for his August hearing. He was not heard from for 10 years. INS sent registered letters to his last known address in an attempt to find him. Petitioner apparently moved and claims he never received the letters. During this decade he married, parented a child, was gainfully employed, filed income tax returns, and obtained an extension or reissuance of his immigration card (green card).

On August 17, 1992 petitioner was convicted in Circuit Court of Fairfax County, Virginia for a 1987 offense of possession of a controlled drug (Cocaine) with intent to distribute. Petitioner turned himself in to the police in

[1] His mother denies ever being a Lithuanian citizen.

Houston and was removed to Virginia where he faced the drug charges which led to his conviction. He was sentenced to serve 16 years with 6 years suspended. He served 2 years of his sentence and was released on parole in January 1994. He was immediately taken into custody by the INS and deportation proceedings were begun again. The INS detained the petitioner without bond based upon his aggravated felony conviction. A bond determination hearing was held and the Immigration Judge denied the petitioner's request for a change in status ordering that he remain in custody without bond. The Immigration Judge based this decision on the likelihood that the petitioner would fail to appear for future immigration hearings because of his prior history. The Board of Immigration Appeals (BIA) denied petitioner's appeal.

On March 29, 1994, petitioner's deportation hearing was held. He admitted all allegations and was found deportable. Seeking relief from deportation, the petitioner applied for a waiver under the Immigration and Nationality Act, which was denied on April 26, 1994. The petitioner was ordered deported from the United States to Germany.

In May of 1994, the INS Officer-in-Charge (OIC) in Oakdale, Louisiana began the petitioner's deportation which, as of today, has still not occurred. Although the petitioner immigrated from Germany and represented to the Immigration Judge he was a German citizen, the German government informed the INS that the petitioner is not a German citizen. Rather, he was born in a German holding camp; his parents were once residents of Lithuania. Lithuania has also denied the petitioner's citizenship.

Thus, the petitioner is "stateless" and is being detained indefinitely since the INS is unable to find a country that will claim him.[2]

The petitioner has applied to this Court for habeas corpus relief on grounds that his indefinite detention pending deportation is unconstitutional. The petitioner asserts the following arguments: 1) that he never made a knowing waiver of his constitutional rights, including his right to counsel; 2) that his detention violates international law; 3) that his detention violates due process; 4) that his detention is in effect one for life and thus violates the Eighth Amendment's prohibition against cruel and unusual punishment.

After a thorough review of the record, Magistrate Judge Louis Moore recommended that the petitioner's request for habeas corpus relief be denied. Judge Moore found that the continued detention of the petitioner was statutorily authorized and that the Attorney General did not abuse her discretion in detaining the petitioner. Judge Moore based his finding on the petitioner's prior failure to appear for his initial deportation proceeding and his prior convictions. In addition, Judge Moore found that the petitioner participated knowingly in his proceeding and that his waiver of his right to counsel was voluntary. Lastly, Judge Moore found that neither International Law nor the Eighth Amendment were violated. Because the INS' efforts to deport the petitioner remained ongoing,

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[2] At the time of this writing the petitioner was still being held pending deportation. As of October 1997 the petitioner has been detained for three years and nine months.

Judge Moore reasoned that the petitioner was not being arbitrarily imprisoned for an indefinite amount of time.

The petitioner now moves this Court to reconsider Judge Moore's report and recommendation under 28 U.S.C. § 636(b)(1)(C). Petitioner asserts that Judge Moore erred in finding that petitioner's original hearing comported with due process and in finding that petitioner's detention was constitutional. The INS urges its original arguments but also asserts that, because of the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Judge Moore as well as this Court has no jurisdiction to review any claims stemming from the petitioner's deportation order.

II.
JURISDICTION OF THE COURT

Before considering the merits of this cause, it is incumbent on the Court to first address the jurisdictional issue.

The Illegal Immigration and Reform and Immigrant and Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, signed into law by President Clinton on September 30, 1996, entirely redefined the scope and/or availability of judicial review of immigration orders and decisions. Section 306 of the IIRIRA rewrote 8 U.S.C. § 1252 (§ 242 of the Immigration and Nationality Act) and provides limits on judicial review of immigration matters. Section 242(g) of the Immigration and Nationality Act ("INA"), as amended by IIRIRA, provides as follows:

> (g) EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any

> other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the Immigration and Nationality Act ("INA")].

See IIRIRA § 306. Most of the amendments to the INA made pursuant to the IIRIRA do not effect habeas corpus petitions filed prior to the effective date of April 1, 1997. Section 1252(g), however applies retroactively, "without limitation to claims arising from all past, pending or future exclusion, deportation or removal proceedings." *Dorean Vayspitter v. United States General Attorney*, 1997 WL 299372, *3 (E.D.La. June 3, 1997); IIRIRA section 306, as amended October 11, 1996 Pub.L. No. 104-302, 110 Stat. 3656, 3657.

Because of Section 1252(g), the Government contends that under the clear terms of § 242(g) of the INA, as amended by the IIRIRA, this Court lacks jurisdiction to entertain the petitioner's claims. In support of their contention, the government cites two recent decisions, *Yang v. I.N.S.*, 109 F.3d 1185 (7th Cir. 1997) and *Safarian v. Reno*, 968 F.Supp. 1101 (E.D.La. 1997). In *Yang*, the Seventh Circuit held that under § 242(g) the district courts are precluded from exercising jurisdiction over deportation-related matters pursuant to 28 U.S.C. § 2241 or any other provision of law. In so holding, the *Yang* court emphasized that, "Congress wanted to expedite the removal of criminal aliens from the United States by eliminating judicial review, not to delay removal by requiring aliens to start the review process in the district court rather than the court of

appeals." *Yang*, 109 F.3d at 1195. Next, the government cites *Safarian, supra*, in which the United States District Court for the Eastern District of Louisiana held that, "the express provisions of the IIRIRA clearly remove jurisdiction under any statute, including a right to habeas corpus under § 2241." According to the Government, only by divesting the federal courts of the power to review agency decisions through the writ of habeas corpus will the "streamlined appeal and removal process" intended by Congress be achieved. H.Rep. No. 104-469(I), 104th Cong., 2d Sess. 359, 463 (1996) (reproduced at 1996 WL 168955).

In his supplemental memorandum on jurisdiction the petitioner argues that this Court has the power to review through the writ of habeas corpus. Despite the enactment of the IIRIRA, the petitioner maintains that this Court retains habeas corpus jurisdiction under 28 U.S.C. § 2241 or Art. I, § 9, cl. 2 of the Constitution. The petitioner contends that this Court has habeas jurisdiction under 28 U.S.C. § 2241 because § 242(g) of the INA, as amended by the IIRIRA, does not effectively eliminate this habeas review. In the alternative, the petitioner contends that even if the IIRIRA validly eliminates the federal courts' habeas review under 28 U.S.C. § 2241, review is nevertheless available under the constitutional writ, unaided by statute.

A. History of Habeas Corpus

It is appropriate at this point to review the historical development of habeas corpus. The history of the right of personal liberty began before the writ of habeas corpus

originated. The right was granted, at least to some English subjects, by Article 39 of Magna Carta, which provided that no free man should be arrested, imprisoned, or destroyed except by the judgment of his peers or by the law of the land. Magna Carta, Art. 39. The essence of this article has been traced back through English law books of the Twelfth Century to documents of the Holy Roman Empire of the Eleventh Century. Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 5 (1978). Although there has been scholarly dispute on the subject, as early as the Fourteenth Century the "law of the land" provision was considered to be the equivalent of "due process of law". Richard L. Perry and John C. Cooper, Sources of Our Liberties, p. 189 (1978); William S. Hollsworth, A History of English Law, 4th ed., Vol. 1, pp. 60-63 (1931). In addition, the protection of this provision was extended to all citizens and not just to the "freemen" who were a limited group of land barons. William S. Holdsworth, A History of English Law, Vol. 1, p. 227 (4th ed. 1931); *Ex Parte Yerger*, 75 U.S.(8 Wall.) 85, 96, 19 L.Ed. 332 (1868).

In America the Colonist claimed the writ as one of the "rights of Englishmen" to which they were entitled under their charters and by reason of the common law. As a result, the privilege of the writ of habeas corpus was incorporated into the constitutions adopted by the states at the time of the American Revolution. See, e.g., Constitution of Pennsylvania, Art. IX (1776). Constitution of Maryland, Art. XXI (1776).

B. Habeas Corpus Protected by Constitution

Habeas corpus is referenced in the Constitution of the United States. Because the writ of habeas corpus plays such a central role in protecting individual liberty, the framers provided in Art. 1, § 9, cl. 2 of the Constitution that "the privilege of the Writ of Habeas Corpus shall not be suspended [except during times of rebellion]."

C. Habeas Jurisdiction Under Statute

In addition to the specific reference in the Constitution, the writ has also been granted by statute. The federal courts have had the power to grant writs of habeas corpus since enactment of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (the "1789 Act"). In 1867, Congress expanded the Supreme Court's statutory appellate jurisdiction while also expanding the power of the federal courts to issue writs of habeas corpus, permitting the issuance of such writs "in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or law of the United States." *Yesil v. Reno*, 958 F.Supp. 828, 1997 WL 86391 (S.D.N.Y. Feb. 27, 1997) (citing Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (the "1867 Act.")) The current version of the Habeas Act is found in 28 U.S.C.A. §§ 2241-2255.

Section 2241 of Title 28 of the United States Code establishes federal courts' power to grant the writ of habeas corpus. It provides, in part, that:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district court and any circuit judge within their respective jurisdictions

. . . .

(c) The Writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under the color or by color of the authority of the United States or

. . . .

(3) He is in custody in violation of the Constitution or laws or treaties of the United States

. . . .

28 U.S.C. § 2241(a), (c)(1), (c)(3). Section 2241 is the direct descendant of Section 14 of the Judiciary Act of 1789 and the 1867 Act, which expanded the scope of the writ. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82; Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. Under Section 2241 habeas corpus will lie to protect the fundamental liberties guaranteed under the Constitution. *Benziane v. U.S.*, 960 F.Supp. 238 (D.Colo. 1997).

The petitioner argues that his access to this judicial review should not be restricted because there is not sufficient "clear and convincing evidence" that the IIRIRA repeals the district court's habeas corpus review under 28 U.S.C. § 2241. His argument is based on the principle espoused by the Supreme Court in *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510-11, 18 L.Ed.2d 681 (1967). In *Abbott Labs*, the Supreme Court adopted a presumption of reviewability which it derived from the structure of the Administrative Procedure Act: "[T]he Administrative Procedure Act . . . embodies the basic

presumption of judicial review. . . . [O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should courts restrict access to judicial review."

Almost one-hundred thirty years ago, and again last year, the Supreme Court explicitly admonished that Congressional intent to repeal habeas jurisdiction must be express and that "[r]epeals by implication are not favored." *Felker v. Turpin*, 518 U.S. 651, ___, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996); *see also Ex Parte Yerger*, 75 U.S.(8 Wall.) 85, 105, 19 L.Ed. 332 (1868). In both *Felker* and *Yerger* the Court refused to read jurisdiction modifying statutes enacted by Congress as repealing other avenues of habeas jurisdiction that had not been specifically abrogated, much less mentioned, by those jurisdiction modifying statutes. "Only upon a clear statement can a court conclude that Congress meant to repeal an independent avenue of habeas jurisdiction." *Mojica v. Reno*, 970 F.Supp. 130 (E.D.N.Y. 1997). Such a clear statement is absent from the governing statute in the present case.

The Government points to the phrase "notwithstanding any other provision of law, no court shall have jurisdiction . . . " In § 242(g) of the INA, as amended by IIRIRA, as evidence that Congress intended to eliminate the district courts' recognized jurisdiction under 28 U.S.C. § 2241. They assert that this is "clear and convincing evidence" that Congress repealed the district courts' power to hear habeas corpus claims of any person in custody, including deportable aliens.

On this point the Court finds helpful the reasoning of the District Court for the District of Columbia in *Ozoanya v.*

Reno, 968 F.Supp. 1 (D.D.C. 1997), a case addressing the issue of whether 28 U.S.C. § 2241 remains a viable basis for habeas jurisdiction after the enactment of the IIRIRA. In *Ozoanya*, the United States District Court for the District of Columbia held that the district courts' jurisdiction to hear claims brought by deportable aliens under 28 U.S.C. § 2241 survives the 1996 amendments to the INA. In so holding the court stated:

> It follows from *Felker* that if Congress had intended to eliminate the district courts' jurisdiction under 28 U.S.C. § 2241 to consider habeas corpus petitions filed by a certain class of persons in custody, it would have had to do so affirmatively and clearly. There is nothing in the language of . . . the IIRIRA to suggest that Congress expressly repealed Section 2241, limited its scope or eliminated the jurisdiction of the district courts under that statute to consider petitions for writs of habeas corpus. . . .
>
> The language of . . . the IIRIRA is "at best ambiguous" it "[does] not state that they repeal or amend section 2241; indeed they do not mention section 2241 at all." *Yesil v. Reno*, 958 F.Supp. 828, 838 (S.D.N.Y. 1997).

Ozoanya, 968 F.Supp. at 6-7.

In *Mojica v. Reno, supra*, the United States District Court for the Eastern District of New York also found that the general habeas statute at 28 U.S.C. § 2241 continues to provide a jurisdictional basis for relief from deportation orders. *Mojica*, 970 F.Supp. 130 (E.D.N.Y. 1997). In an opinion that supplements *Ozoanya*, the *Mojica* court stated:

> Congress is expert in the process of lawmaking. Had it desired to repeal section 2241, or render it inapplicable to challenges to deportation orders, it would have taken the necessary steps to do so. It must be presumed that Congress was mindful of the necessity for a clear statement to that effect. Congress is presumed to know the law. As the *Felker* Court acknowledged, Congress knows how to repeal habeas jurisdiction. Where it intended to do so, it states that intention expressly. *See, Felker v. Turpin*, 518 U.S. 651, ___, 116 S.Ct. 2333, 2338, 135 L.Ed.2d 827 (1996).

Mojica, 970 F.Supp. at 160 (citations omitted).

The *Mojica* court also referred to findings relating to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), the statutory predecessor to the IIRIRA. The AEDPA, like IIRIRA, also contained a section which attempted to withdraw habeas corpus jurisdiction by all courts. Like the IIRIRA, the AEDPA did not expressly purport to modify section 2241. *Yesil*, 958 F.Supp. 828 (S.D.N.Y.). The *Mojica* Court, to provide further support for their holding, pointed out that district courts addressing the AEDPA's effect on § 2241 "have been almost unanimous in their agreement that § 2241 is available and has not been repealed." *Mojica*, 970 F.Supp. At 161, [citing *Yesil*, 958 F.Supp. 828 (S.D.N.Y. 1997); *Eltayeb v. Ingham*, 950 F.Supp. 95 (S.D.N.Y. 1997); *Duldulao v. Reno*, 958 F.Supp. 476 (D.Haw. 1997); *Dunkley v. Perryman*, 1996 WL 464191 (N.D.Ill. 1996); *Mbiya v. INS*, 930 F.Supp. 609 (N.D.Ga. 1996)]. Essentially, all these courts found that § 2241 was still available despite the enactment of the AEDPA, because the latter did not expressly repeal § 2241.

Because the AEDPA and the IIRIRA basically contained the same jurisdictional withdrawal provision, the Court in *Mojica* utilized this logic in analyzing the effect of IIRIRA on § 2241 jurisdiction. By doing so it came to the conclusion stated earlier that, in the wake of the IIRIRA, section 2241 remains a viable basis for habeas jurisdiction. *Mojica*, 970 F.Supp. at 159-163.

This Court agrees with the reasoning of both the *Ozoanya* and *Mojica* courts. Because the IIRIRA does not amend, or even mention, section 2241 of Title 28, the Court cannot conclude that Congress repealed § 2241 by implication. In order to have effectively repealed this statute Congress would have had to say so explicitly. It must be remembered that "[c]ourts do not have to resort to divining phantom or unarticulated Congressional intentions to repeal habeas jurisdiction from the void of statutory silence." *Mojica*, 970 F.Supp. at 160. Furthermore, if the Court were to find that the statute was repealed, the Court arguably would be violating the Suspension Clause of the Constitution. See Art. I, § 9, cl. 2; *Mbiya*, 930 F.Supp. at 612 ("Any attempt by Congress to restrict this sphere of authority necessarily would create constitutional difficulties not only with respect to the Suspension Clause, but also with respect to the Constitution's delineation of authority between the branches of the government").

D. Continued Viability of Habeas Corpus

In summary, from a historical and jurisprudential perspective, it is clear that the great writ still has vitality and that this court has jurisdiction. The suggestion that the

IIRIRA bars all habeas corpus review must be rejected. *See Yang v. INS*, 109 F.3d 1185, 1194-97 (7th Cir. 1997); *Boston-Bollers v. INS*, 106 F.3d 352, 355 (11th Cir. 1997); *Williams v. Immigration & Naturalization Service*, 114 F.3d 82, 84 (5th Cir. 1997). In the present case, however, it is necessary to explore whether this petitioner, a non citizen legal alien, fits within the scope of this concept.

III.

Scope of Habeas Review

"Habeas Corpus review under § 2241 [or as contemplated by art. 1, section 9 of the Constitution] is justified if an alien subject to an order of deportation based on violation of crimes enumerated by Congress demonstrates some grave constitutional error or a fundamental miscarriage of justice." *Mbiya*, 930 F.Supp. 609, 612 (N.D.Ga. 1996); *See also, Yesil*, 958 F.Supp. 828 (S.D.N.Y. 1997); *Eltayeb*, 950 F.Supp. 95 (S.D.N.Y. 1997). With the enactment of the IIRIRA, Congress evidenced its desire to expedite the deportation of criminal aliens and to restrict all judicial review of final orders of deportation to the greatest extent possible. Thus, in determining the scope of habeas review, courts have concluded that review should be limited to those situations in which deportation would result in a fundamental miscarriage of justice. *Id.* The rationale for this narrow scope of review is that it "is necessary to accommodate the balance between an alien's constitutional right to habeas review and Congress' power over matters of immigration." *Eltayeb*, 950 F.Supp. at 99. Hence a court should grant relief to the petitioner only if he demonstrates some grave constitutional error

or a fundamental miscarriage of justice. Accordingly, the Court will analyze the petitioner's claims under this narrow standard of review.

A. Procedural Due Process Claims – Deportation Hearing

The Court will first address the petitioner's claim that his deportation hearing was in violation of his right to due process. Specifically, the petitioner claims that the deportation hearing violated procedural due process and fundamental fairness because the petitioner never made a knowing waiver of his constitutional rights. The petitioner contends that because he was never told by the Immigration Judge that he could be detained for an indefinite period of time as a result of the deportation hearing, he waived several important rights and made a number of significant admissions, such as electing not to obtain an attorney and admitting he was a German citizen. He also contends that he was never told by the Immigration Judge that his relatives' interest would be one of the principal determining factors in the outcome of the case. Furthermore, he was never asked by the Immigration Judge if he could obtain affidavits from his relatives expressing their interest. Accordingly, the petitioner contends that his right to call such witnesses and produce affidavits was waived unknowingly.

Aliens within this country who face expulsion are entitled to the procedural safeguards of due process. As the Supreme Court has held, "once an alien gains admission to a country and begins to develop the ties that go with permanent residence his constitutional status changes

accordingly." *Landon v. Plasencia*, 459 U.S. 21, 32-33, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). "The Supreme Court has frequently suggested that a continuously present alien is entitled to a fair hearing when threatened with deportation, and, has developed the rule that a continuously present permanent resident alien has a right to due process in such a situation." *Id.*

The Due Process Clause of the Fifth Amendment provides that "[n]o person . . . shall be deprived of life, liberty, or property without due process of law. . . . " It protects individuals against two types of government action. "Substantive Due Process" prevents the government from engaging in conduct that "shocks the conscience,"[3] or interferes with rights "Implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). "Procedural Due Process" ensures that government action depriving a person of life, liberty, or property is implemented in a fair manner. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

As stated above, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306, 113 S.Ct. 1439, 1449, 123 L.Ed.2d 1 (1993). Accordingly, the Immigration Judge must conduct deportation hearings in accord with the standards of due process. *Olabanji v. I.N.S.*, 973 F.2d 1232, 1234 (5th Cir. 1992). If the deportation hearings are not conducted properly, a due process violation exists when the defect impinges "upon the fundamental fairness of the hearing

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[3] *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952).

in violation of the Fifth Amendment, and there existed substantial prejudice." *Ogbemudia v. I.N.S.*, 988 F.2d 595, 598 (5th Cir. 1993).

1. Petitioner's waiver of right to counsel

Although Congress has provided by statute that an alien has a right to obtain counsel at his own expense, an alien does not have a Sixth Amendment right to counsel in an immigration proceeding. Thus, "any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel." *Barthold v. U.S. Immigration and Naturalization Service*, 517 F.2d 689 (5th Cir. 1975).

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the "totality of circumstances approach" for reviewing waiver of Fifth Amendment rights. In order for a waiver of right to counsel to be valid it must be made knowingly and intelligently. *Molignaro v. Smith*, 408 F.2d 795 (5th Cir. 1969). Thus if petitioner's waiver of counsel was not made knowingly or intelligently, then the Immigration Judge's acceptance of it could constitute a due process violation if it impinged "upon the fundamental fairness of the hearing in violation of the Fifth Amendment" and resulted in substantial prejudice. *Ogbemudia*, 988 F.2d at 599. The determination of whether a waiver of the right to counsel has been made knowingly and intelligently depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

The petitioner likens his waiver of rights in the administrative hearing to those waived by a criminal defendant in a guilty plea. The test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985). The petitioner contends that he did not knowingly waive his right to counsel at the deportation hearing because the Immigration Judge did not inform him that a result of the hearing could be prolonged detention. After review and study of the administrative record, the United States Magistrate Judge found that the petitioner, despite the claimed defect, knowingly and intelligently waived his right to counsel. This Court agrees.

Having reviewed the record in light of the "totality of the circumstances," the Court is convinced that the petitioner's waiver of counsel during the deportation hearing was constitutionally valid and that there was no fundamental unfairness in the Immigration Judge's acceptance of this waiver. Therefore, the petitioner was not deprived of due process. First, the petitioner should have known about the value of counsel in legal proceedings due to his extensive first hand knowledge of the criminal justice system. Secondly, he was specifically told that he had a right to counsel and was advised about the ramifications and possible consequences of his admissions. This factor alone is sufficient to support a finding that there was not a denial of due process. *Barthold*, 517 F.2d 689 (5th Cir. 1975).

The Court does not agree with the petitioner that the Immigration Judge had a duty to inform him, that if

found deportable he could be detained while awaiting deportation. The nature of a deportation hearing is civil in nature. *Ramirez-Osorio v. I.N.S.*, 745 F.2d 937 (5th Cir. 1984). "Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation." *INS v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984). Thus, a waiver of counsel in a deportation hearing need not be "made with an apprehension of . . . the range of allowable punishments thereunder, . . . and all other facts essential to a broad understanding of the matter." *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (1948). In short, the petitioner has failed to present any authority for his argument that an Immigration Judge in a deportation proceeding must inform the alien of all the possible consequences that might result from a finding of deportability. Accordingly, the Court finds the fact the Immigration Judge failed to inform the petitioner of the possibility of prolonged detention did not alter the fact that the waiver of counsel was made knowingly. Hence, the deportation hearing was conducted in accordance with the requirements of due process and fundamental fairness.

2. Petitioner's lack of affidavits and admissions that he was a Citizen of Germany

The second prong of the petitioner's due process claim, is that his lack of attorney prejudiced him at the deportation hearing. As such the petitioner believes that the deportation hearing was unfair and did not comport with the requisites of procedural due process. Specifically, the petitioner contends that the lack of affidavits

from his relatives and his conclusion that he was a German citizen interfered with his chance to obtain Section 212(c) relief of the Immigration Act. Accordingly, the petitioner contends that his right to due process of the law was violated.

Under Section 212(c) of the Immigration and Nationality Act, aliens admitted for permanent residence who have maintained a lawful unrelinquished domicile in the United States for seven consecutive years, may in the Attorney General's discretion, be permitted to continue residing in the United States notwithstanding their deportability under other sections of the Act. *Ashby v. I.N.S.*, 961 F.2d 555 (5th Cir. 1992). Section 212(c) does not provide an indiscriminate waiver for all who demonstrate statutory eligibility for such relief. *Id.* Rather, the petitioner bears the burden of demonstrating that his request for a waiver warranted favorable consideration. Further, "because section 212(c) does not provide standards governing how the Board's discretion should be exercised, the Attorney General has unusually broad discretion in granting and denying waivers." *Id.*

In order to provide the framework for an equitable application of discretionary relief, the Board has enunciated factors relevant to the issue of whether § 212(c) relief should be granted as a matter of discretion:

> Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's laws, the existence of a criminal record and, if so, its

> nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as permanent resident of this country.

Matter of Marin, 16 I & N Dec. 581, 584-85 (BIA 1978). The decision to grant § 212(c) relief is within the sole discretion of the Immigration Judge.

The AEDPA and the IIRIRA both evidence Congress' intent to preclude from review those matters particular to the agency's discretion and expertise – i.e., matters involved in determinations of deportability. *Anwar v. I.N.S.*, 107 F.3d 339, 342 (5th Cir. 1997). The petitioner, however, does not ask this Court to review the decision of the Immigration Judge to deny discretionary relief. Rather, the petitioner is seeking review of certain procedural aspects of the hearing at which the Immigration Judge decided not to grant discretionary relief under § 212(c). Accordingly, the petitioner's challenges are reviewable by this Court for the purpose of determining whether the hearing was conducted in accordance with due process.

a. Lack of Affidavits

The petitioner's alleged due process violation is that he was never told that he, pursuant to § 212(c), could provide affidavits at the hearing in support of his application for § 212(c) relief. Accordingly, the petitioner contends that this defect rendered the hearing unfair and that he was substantially prejudiced thereby. The Board of Immigration Appeals has set forth several "favorable

considerations" on which the alien may "present [ ] evidence in support of a favorable exercise of discretion" under § 212(c):

> Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country . . . , evidence of hardship to the respondent and family if deportation occurs, . . . , a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

Matter of Marin, 16 I & N Dec. at 584-85 (citation omitted). The petitioner argues that his right to due process of the law was violated by the Immigration Judge failing to inform him that he could provide affidavits and then basing the decision to deny § 212(c) relief on a lack of such affidavits.

The Court finds that the petitioner's lack of affidavits did not "impinge upon the fundamental fairness of the hearing in violation of the Fifth Amendment," or substantially prejudice the petitioner. *Ogbemudia*, 988 F.2d at 595 (5th Cir. 1993). First, a due process challenge requires a showing of substantial prejudice to the petitioning alien. *Hernandez-Garza v. INS*, 882 F.2d 945 (5th Cir. 1989). Also, "to render a hearing unfair, the defect or practice complained of must have been such as might have led to a denial of justice, or there must have been absent an element deemed essential to due process." *Animashaun v.*

Immigration and Naturalization Service, 990 F.2d 234, 238 (5th Cir. 1993).

The petitioner, however, contends that his due process rights were violated because the Immigration Judge made the lack of affidavits a key factor in deciding whether to grant § 212(c) relief. Essentially the petitioner contends that had he been informed of his right to provide affidavits from his relatives indicating they would suffer emotional hardship if he were deported, he would have done so. According to the petitioner, these affidavits would have persuaded the Immigration Judge to grant relief under § 212(c). Thus, the petitioner contends that he was substantially prejudiced by his lack of affidavits. The Court disagrees.

The Immigration Judge, despite the lack of affidavits outlining hardship, assumed that deportation would adversely effect the petitioner and his relatives. He then "balance[d] the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether granting section 212(c) relief appear[ed] in the best interests of this country." *Matter of Marin*, 16 I & N Dec. at 584-85. Balancing these factors, the Immigration Judge found that the extreme hardship the petitioner and his family would suffer if he was deported was one of the most positive equities weighing in his favor. The effect that the petitioner alleges the affidavits would have had on the deportation hearing was achieved when the Immigration Judge assumed that the deportation would cause extreme hardship. Thus, the lack of affidavits did not prejudice the petitioner.

Moreover, the court finds no fundamental unfairness in the deportation hearing because the petitioner cannot point to anything in § 212(c) that required the Immigration Judge to inform him of his right to submit affidavits from relatives. Had the petitioner retained counsel, it would have been the obligation of the attorney to inform him of this right. However, the Immigration Judge was not the petitioner's counsel. Thus, the Immigration Judge's failure to inform the petitioner of his right to submit affidavits from relatives did not lead to a denial of justice. Hence, the petitioner's original deportation hearing was fair and comported with the requisites of due process.

b. Petitioner's Admission that he was a German Citizen

The petitioner also contends that the immigration judge mistakenly believed he was a German citizen. According to petitioner, had the Immigration Judge realized he had no country that would claim him as a citizen, the Immigration Judge would have granted him relief under § 212(c). Thus, he contends that the deportation hearing was constitutionally flawed. The Court disagrees.

The Immigration Judge did not deny § 212(c) relief simply because he believed that the petitioner was a German citizen. Section 212(c) relief was denied because of the petitioner's past criminal history and his prior episode of "bond jumping." The fact that the petitioner claimed he was a German citizen played only an insignificant part, if any, in the Immigration Judge's decision to deny § 212(c) relief. On page 14 of his Motion and

Incorporated Memorandum to Review the Magistrate's Report and Recommendation, the petitioner even admits that the conclusion was innocuous. Accordingly, this Court finds that the Immigration Judge's finding as to the petitioner's citizenship did not substantially prejudice the petitioner, or render his hearing fundamentally unfair.

B. Substantive Due Process Claim – Detention pending Deportation

The petitioner claims that his continued detention pending deportation violates his Fifth Amendment right to substantive due process. In arguing that the length of his detention (a denial of petitioner's asserted liberty interest) "shocks the conscience," the petitioner focuses on the substantive nature of the alleged constitutional violation.

Narrowly framed, the issue before this Court is whether a legal alien who is under a final order of deportation may be permanently incarcerated because the INS cannot find a country to take him. The Court must determine whether such detention is beyond permissible constitutional limitations. *Tran v. Caplinger*, 847 F.Supp. 469 (W.D.La. 1993).

1. Statutory Authority

It is necessary to note that control over matters of immigration and naturalization is the "inherent and inalienable right of every sovereign and independent nation." *Fong Yue Ting v. U.S.*, 149 U.S. 698, 711, 13 S.Ct. 1016, 1021, 37 L.Ed. 905 (1893). Under the United States

Constitution, such control is vested in the political branches of government. See U.S. Const., art. 1, § 8, cl.4. Congressional power in their area is plenary, subject to only limited judicial review. See *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977). In exercising its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 80, 96 S.Ct. at 1891. Nonetheless, aliens both legal and illegal, are entitled to the constitutional protection of due process, equal protection and reasonable bail. *Id.* Also, legal aliens subject to deportation – the category in which petitioner falls – generally are granted greater substantive rights than are excludable aliens. *Landon*, 459 U.S. at 26-27, 103 S.Ct. at 325-26. With this in mind, the Court will review the petitioner's detention to determine whether it is violative of his substantive due process rights.

At the outset, the Court notes that petitioner is properly classified as a convicted aggravated felon because of his controlled substance violation. True, the petitioner has served his sentence and hence paid his debt to society, but that fact does not alter this status. See, 8 U.S.C. § 1101(a)(43). Petitioner does not challenge this finding.

The INA authorizes the Attorney General on behalf of the INS to take an alien into custody pending deportation. See generally, 8 U.S.C. § 1252. Section 1252(a)(2)(A) of the Act specifically provides for the detention of aggravated convicted felons, as follows:

> The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised

> release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

Paragraph (B) then provides:

> The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

Section 1252(a)(2) creates a rebuttable presumption against the release of any alien who is convicted of an aggravated felony. *See Matter of Ellis*, 1993 WL 65657 (BIA 1993). Detention is required by 8 U.S.C. § 1252(a)(2)(A) unless the alien can rebut the presumption by successfully meeting the burden of proof set forth in 8 U.S.C. § 1252(a)(2)(B). Deportable aliens, convicted of aggravated felonies, who are lawfully admitted have an opportunity to overcome the presumption against their release by presenting favorable evidence to an Immigration Judge in an individual bond hearing. In order to be eligible for release, an alien convicted of an aggravated felony must show that he is lawfully admitted, that he is not a threat to the community, and that he is likely to appear at any scheduled hearings. 8 U.S.C. § 1252(a)(2)(B).

In this case, petitioner has established that he was lawfully admitted to this country; as to the other two

requirements, however, petitioner has not met his burden of proof. Considering petitioner's recidivist history and his prior episode of "bond jumping," petitioner has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.[4]

According to the language of 8 U.S.C. § 1252(a)(2)(A) detention is clearly mandated for aggravated felons who have not overcome the presumption against their release. See 8 U.S.C. § 1252. The language of 8 U.S.C. § 1252(a)(2)(B) and the Transitional Custody rules of the IIRIRA also contain language which supports mandatory detention. Additionally, nowhere in the relevant statute does Congress place a time limit on the detention. In *Tran v. Caplinger*, 847 F.Supp. 469 (W.D.La. 1993), the District Court for the Western District of Louisiana stated:

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[4] The petitioner has received a discretionary bond redetermination based entirely on the recent enactment and invocation of the superseding Transitional Custody Rules of the IIRIRA. The Transition Period Custody Rules replaced the amendments made by section 440(c) of the AEDPA. Aliens who, like the petitioner, are deportable for having been convicted of an aggravated felony or a controlled substance violation may be released if: "(I) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding."

See Section 303(b)(3)(B) of the IIRIRA. Consequently, in compliance with the Transitional Custody Rules, INS has interviewed the petitioner and has reviewed his file. Again, the INS has decided not to release the petitioner because he has not met his burden of proving that he is not a threat to the community and that he is likely to appear for scheduled hearings.

> Congress has made provisions for expediting deportation proceedings of aliens who are convicted of committing aggravated felonies. See 8 U.S.C. § 1252(a). However despite efforts to expeditiously deport aggravated felons, there are times when circumstances beyond the control of the Attorney General and her agents make immediate deportation impracticable, unadvisable, or impossible. When such delays occur, Congress has not expressly limited the power of the Attorney General to detain such aliens. Neither section 1252(a)(2) nor section 1252(a) places a time limit upon the period of detention. Clearly, Congress knows how to place time limits upon the period of detention if they had chosen to do so. See 8 U.S.C. § 1252(c).

Consequently, the mandatory language and the absence of a time limit on detention leads this Court to conclude that "indefinite detention of deportable aliens who are aggravated felons is statutorily authorized when immediate deportation is not possible and the alien has not overcome the presumption against his release." Tran, 847 F.Supp. at 474. *See, also, Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Gisbert v. U.S. Atty. Gen.*, 988 F.2d 1437 (5th Cir. 1993).

2. Constitutional Challenge

This Court agrees with the Court in *Tran*, that "[w]hile there is statutory authority allowing indefinite detention of an alien who is classified as an aggravated felon under immigration law where the alien is unable to overcome the presumption which is established by 8 U.S.C. § 1252(a)(2), it is unclear how long this detention

can continue without becoming violative of an alien's constitutional rights." Thus, "it is necessary for this Court to analyze the Petitioner's detention in light of his constitutional challenge to determine whether Petitioner's detention has continued beyond permissible constitutional limitations." *Id.*

At the outset this Court again notes that the Fifth Amendment's mandate that "no person shall . . . be deprived of life, liberty, or property, without due process of law" extends due process protection to persons within the territorial United States and not just to U.S. citizens. *See Plyler v. Doe*, 457 U.S. 202, 210-12, 102 S.Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). Thus, the petitioner is entitled to have his detention reviewed by this Court to make sure it comports with the notions of due process.

The constitutionality of the detention must be considered in light of its purpose. The Fifth Circuit has indicated that the focus must be on "whether the detention is imposed for the purpose of punishment or whether it is merely incidental to another legitimate governmental purpose." *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1441 (5th Cir. 1993), citing *Schall v. Martin*, 467 U.S. 253, 268-69, 104 S.Ct. 2403, 2412, 81 L.Ed.2d 207 (1984). Absent "any expression of intent to punish on the part of the government, that determination will generally turn on 'whether an alternative purpose to which [the detention] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].' " *Id.* at 1441-42, citing *Schall*, 467 U.S. at 268-69, 104 S.Ct. at 2411-12.

The legislative history and text of Section 1252 clearly shows that Congress did not contemplate permanent detention as a means of punishment for aliens convicted of aggravated felonies who have already served their sentence. *Tran*, 847 F.Supp. at 474. Section 1252(a)(2)(B) of the INA and § 303(b)(3)(B) of the IIRIRA provides for the release of a lawfully admitted alien who has been convicted of an aggravated felony where the alien has demonstrated that he is neither a threat to others nor a flight risk. Thus, the purpose behind detention of these aliens is to protect the community from aggravated felons and to prevent aliens from absconding before deportation can be accomplished. *Id.*, *Caballero v. Caplinger*, 914 F.Supp. 1374 (E.D.La. 1996). Accordingly, the question of whether petitioner's detention complies with substantive due process ultimately turns on whether the detention in petitioner's case is excessive in relation to these goals.

The court in *Tran* determined that continued detention of a non-excludable alien under § 1252 pending deportation is not an excessive means of accomplishing the government's purpose. *Tran*, 847 F.Supp. 469. The *Tran* court recognized the heightened interest of Congress in immigration matters and noted that the INS had limited application of § 1252(a)(2) detention to those aliens who have already been judicially determined to have committed a felony. *Id.* at 475. The Court also notes that in *Gisbert* the Fifth Circuit using essentially the same rationale as the court in *Tran* found that the continued detention of an excludable alien pending deportation was not an excessive means of accomplishing the purposes sought to be served by § 1252(a). *See also Caballero*, 914 F.Supp. at 1374.

It is clear that protecting the community from aggravated felons and preventing aliens from absconding before deportation are legitimate governmental policy goals that, "can warrant a deprivation of liberty under the proper circumstances." *U.S. v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

The particularly troublesome aspect of the petitioner's detention is its duration to date and its potential, if not certainty, for indefinite duration in the future. Detention is intended for the sole purpose of effecting deportation, and once it becomes evident that deportation is not realizable in the future, the continued detention of the alien loses its *raison d'etre*. If there is nowhere to send the alien, then indefinite detention is no longer a temporary measure in the process of deportation; it is permanent confinement. "Detention pending deportation seems properly analogized to incarceration pending trial or other disposition of a criminal charge, and is, thus justifiable only as a temporary measure." *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

Federal circuit and district courts have long held that deportable aliens in custody for more than a few months must be released because such detention becomes imprisonment. For example, in *Petition of Brooks*, 5 F.2d 238, 239 (D.Mass. 1925) the court declared:

> "The right to arrest and to hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a crime. Slavery was abolished by the Thirteenth

> Amendment. It is elementary that deportation or exclusion proceedings are not punishment for a crime. . . . He is entitled to be deported or to have his freedom."

and, in *United States ex rel. Ross v. Wallis*, 279 F. 401, 403-04 (2d Cir. 1922), the court stated:

> " . . . we therefore express an opinion that unless this relator, or any other person similarly situated, be actually deported within four months after such alien has exhausted his legal remedies, any further or other detention under pretense of awaiting opportunity would amount, and will amount, to an unlawful imprisonment, from which relief may be affected by a new habeas corpus."

Thus, courts have not hesitated to condemn the detention of an alien whenever it has appeared, following the lapse of a reasonable time, that his deportation was impossible or could not be effected in the foreseeable future. See *U.S. ex rel. Kusman v. District Director of Immigration and Naturalization at Port of New York*, 117 F.Supp. 541 (S.D.N.Y. 1953); *U.S. ex rel. Ross v. Wallis*, 279 F. 401 (2d Cir. 1922); *Caranica v. Nagle*, 28 F.2d 955 (9th Cir. 1928); *Wolck v. Weedin*, 58 F.2d 928 (9th Cir. 1932); *In re Hanoff*, 39 F.Supp. 169 (D.Cal. 1941); *U.S. ex rel Janavaris v. Nicolls*, 47 F.Supp. 201 (D.Mass. 1942). The United States District Court for the District of Kansas stated that:

> "The rationale underlying these decisions was that detention was intended for the sole purpose of effecting deportation. Once it has become evident that deportation was not realizable in the foreseeable future, the continued detention was found to be without cause."

Fernandez v. Wilkinson, 505 F.Supp. 787, 792 (D.Kan. 1980). Courts have held that approximately two to four months was a reasonable period to detain an alien pending deportation efforts. *Id.* In the wake of these holdings, Congress enacted 8 U.S.C. § 1252(c), which gave the Attorney General six months in which to accomplish the aliens departure.[5] Although, the section has been repealed it does exhibit that at one point in time Congress disapproved of detention beyond the reasonable time necessary to execute a final order of deportation.

Based upon the rationale above, this Court finds that the petitioner's detention of nearly four years with no end in sight, and the probability of permanent confinement, is an excessive means of accomplishing the purposes sought to be served by 8 U.S.C. § 1252(a). The inability of the INS to obtain travel documents for the petitioner within nearly four years troubles this Court. The United States has amicable relationships with Germany and Lithuania. Thus the INS cannot claim that uncertain status between the United States and any one of these countries is the reason for the inability to deport

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[5] 8 U.S.C. § 1252(c) stated in pertinent part as follows: Final Order of Deportation; place of detention. When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or is [sic] judicial review is had, then from the date of the final order of the court within which to effect the alien's departure from the United States, during which period at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other conditions as the Attorney General may prescribe.

and imply that in due time the situation will or may change. The fact of the matter is that the petitioner is not now nor has he ever been a citizen of any country. To say that he is temporarily detained pending deportation is not accurate. The petitioner, a legal alien, will never be deported because there is no place to send him. This fact distinguishes this case from the other cases cited elsewhere in this opinion dealing with aliens awaiting deportation. The petitioner is reminiscent of E.E. Hale's novel, "Man Without A Country," except that his perpetual confinement is in a prison rather than on a ship. This result "shocks the conscience" of the Court.

Accordingly, the Court finds that the petitioner's detention is violative of his constitutional rights to substantive due process.[6]

IV.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that the petitioner's application for writ of habeas corpus is HEREBY GRANTED.

IT IS FURTHER ORDERED that the petitioner, Kestutis Zadvydas, SHALL BE RELEASED from the custody

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[6] The petitioner makes two other arguments relating to his continued confinement pending deportation. The first of these contentions is that the petitioner's right to procedural due process was violated as to his continued confinement. The second contention is that the petitioner's incarceration violates the Eighth Amendment's prohibition against cruel and unusual punishment. However, because of this Court's ruling on substantive due process this Court need not address these claims.

of the INS upon conditions to be set by the Court at a hearing, which shall be held on Wednesday, November 12, 1997 at 9:00 a.m. in Room C-468.

IT IS FURTHER ORDERED that petitioner shall be released within 35 days from the date of such hearing.

EXCERPT FROM REPORT OF PSYCHIATRIC EVALUATION DATED NOVEMBER 19, 1997 (PAGES 3-4)

Family History. Denies mental illness in the family. Father had a drinking problem, no suicide in the family.

Drug/Alcohol History: He claims he drinks occasionally. Had cocaine habit, that is the reason he went to jail.

Social/Person History: Father died 25 years ago of heart attack. Mother living in New York. All of his family live in New York. He claims he has 3 brothers. Patient is a twin. Had 4 sisters. Patient is the middle child in the family. He claims he gets along well with brothers and sisters. Wife lives in Houston and works for the city of Houston. He has a 17 year old daughter. He claims he talks to his family and they write him letters. His wife lives in Houston with his daughter.

Criminal History: Had been in jail before. He said he was 17 years old when he committed armed robbery. He stated that he would not do it anymore.

Sexual History: He said he was physically abused by father but no nightmares. No sexual abuse while growing up.

Mental Status Examinations: During interview patient is wearing tangerine uniform, hand cuffed and in leg chains. Poor eye contact, no abnormal gait, no psychomotor hyperactivities, speech coherent and relevant. No loss of association. He was vocal about his condition. He does not have any country. He is stressed out about what is going on with him in prison. He wants to go home to his family in Houston so that he will be together with his wife and daughter. Mood depressed, affect sad. Not

homicidal, nor suicidal. He does not sleep good because of his condition in jail. He described he is in a room with many other people walking around and it is noisy. Appetite poor, he claimed he lost three and one half pounds because he cannot eat the food they are giving him. He claimed he had been in St. Martinville since November 10, 1997. Denies hallucinations, not delusional during this interview. He is oriented to time, place, person and situation. Recent and remote memory fair. He was able to do simple spelling. He recalled 3 to 3 objects in 5 minutes. Similarly good serial of seven started 93, then he stated he is not good in math. Able to name Clinton, Bush, Reagan and Carter as Presidents of the United States backward. Abstract thinking good, judgment and insight good during this interview. Estimate intellectual function average intelligence. No abnormal involuntary movement during this interview. Assets of this patient: he can communicate well in English and he is physically healthy.

Diagnosis: Axis I: Adjustment Disorder with Mixed Emotional Feature
Axis II: Defer
Axis III: Defer
Axis IV: He is unemployed, did not finish school, has been incarcerated.
Axis V: GAF 90

Recommendation: Individual therapy to overcome his stress and difficulty but he says he does not want to come back and talk to me because he is OK. At the present time he is not dangerous to himself or to others during this interview.

Daniel M. Faculoma, M.D.
11/19/97

MINUTE ENTRY
DECEMBER 17, 1997
FALLON, J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KESTUTIS ZADVYDAS	*	CIVIL ACTION
	*	
VERSUS	*	NO. 96-810
JOHN B.Z. CAPLINGER	*	SECTION "L"

Considering the government's motion to alter or amend judgment, IT IS ORDERED that such motion is HEREBY DENIED. In rendering its decision in this matter, the Court was fully aware that petitioner is theoretically eligible to be considered for release by the INS and that he may again and again apply to the INS for a change in custody status. This does not alter the Court's conclusion that this petitioner's detention had no end in sight.

/s/ Honorable Eldon E. Fallon

Date of Entry DEC 19 1997

[SEAL] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS (DDP) 50/10-C

Office of the Executive Associate Commissioner
425 I Street NW
Washington, DC 20536

OCT – 7 1998

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson /s/ Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Detention Guidelines Effective October 9, 1998

As you know, the Immigration and Naturalization Service (INS) supported a legislative proposal for extension of the Transition Period Custody Rules (TPCR). This extension will allow us to continue the exercise of discretion in custody determinations. However, we expect that it will be some time before this discretion is granted with the result that as of October 9, 1998, TPCR discretionary authority will no longer be in effect. Attached with this memorandum are the detention guidelines which will be in effect as of October 9.

I recognize that 100 percent compliance with these guidelines will be virtually impossible to achieve immediately. Furthermore, 100 percent adherence to the guidelines would have major impacts on other program operations which are critical to the overall INS mission. We have met with Congressional staff to advise them of the impacts on our operations resulting from the expiration of TPCR. We have been advised that we may get

future Congressional support for some type of discretionary relief from mandatory detention, but only if we can document and demonstrate that a maximum effort to comply with the detention mandates has been made. Shortly, we will provide you with guidance concerning additional data that we will need to collect and provide to Congress.

At this time, I am directing that, to the extent possible, you adhere to the detention scheme outlined in the attached and work toward utilizing 80 percent of your bedspace for mandatory detention cases. In the event that a District Director, Chief Patrol Agent, or Officer In Charge makes a custody determination which is not in keeping with the guidelines (e.g., a Category 1 case is released to make detention space for a Category 2 or 3), the reasons for the decision must be clearly documented in writing and placed in the alien's file. At any time the mandatory detention occupancy falls below 80 percent of available bedspace, the responsible field manager must notify the Regional Director.

In the event that your District Directors have released someone prior to October 9, who is now subject to detention, nothing in this memorandum should be construed as requiring their rearrest/detention. However, if conditions have changed or circumstances warrant, nothing should preclude you from exercising your authority to rearrest and detain.

Additionally, each Regional Director is directed to prepare a written monthly summary of custody determinations made by field offices within your respective jurisdictions which are inconsistent with the attached

detention guidelines. The monthly summaries will be used to justify our need for continued discretion in detention decisions in our ongoing discussions with the Department of Justice, the Administration, and the Congress. The first monthly summary will be for the month ending October 31. Regions should forward the summaries to this office not later than 1 week after the end of the month.

Attachment

[SEAL] U.S. Department of Justice
Immigration and Naturalization Service

HQOPS 50/10

425 I Street NW
Washington, DC 20536

OCT - 7 1998

INS DETENTION USE POLICY
October 9, 1998

I. INTRODUCTION

This policy governs the detention of aliens and supersedes, the Detention Use Policy issued July 14, 1997. The purpose of this policy is to revise the detention priorities of the Immigration and Naturalization Service (INS) in light of the expiration of the Transition Period Custody Rules (TPCR). Section 236(c) of the Immigration and Nationality Act (INA) is now in full force and effect. With the expiration of the TPCR, certain portions of 8 C.F.R.

§3.19 and §236.1, as noted in those sections, no longer apply.

Under this policy, the four categories of alien detention are: (1) required (with limited exceptions), (2) high priority, (3) medium priority, and (4) lower priority. Aliens in category 1 – required detention – must be detained, with a few exceptions. Aliens in categories 2, 3, and 4 may be detained depending on the availability of detention space and the facts of each case. Aliens in category 2 should be detained before aliens in categories 3 or 4, and aliens in category 3 should be detained before aliens in category 4. The District Director or Sector Chief retains the discretion, however, to do otherwise if the facts of a given case require.

These instructions do not apply to the detention and release of juveniles, which is covered in other INS policies.

II. DEFINITIONS

- *Required detention:* Detention of certain classes of aliens required by the INA or applicable regulations. With few exceptions, aliens subject to required detention must be detained and are not eligible for release.
- *Discretionary detention:* Detention of aliens authorized but not required by the INA or applicable regulations. All aliens in proceedings are subject to discretionary detention unless they fit into one of the categories covered by required detention. Aliens subject to discretionary detention are eligible to be considered individually for release.
- *Final order of removal:* Final removal order issued by an immigration officer, an immigration judge (IJ), the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings on or after April 1, 1997. INS officers should consult District counsel on issues regarding the finality of removal orders.

- *Final order of deportation or exclusion:* Final deportation or exclusion order issued by an immigration officer, an immigration judge, the Board of Immigration Appeals, or a Federal judge to an alien placed in proceedings before April 1, 1997. INS officers should consult District counsel on issues regarding the finality of deportation or exclusion orders.

III. DETENTION CATEGORIES

A. Arriving Aliens: Expedited Removal under INA §235.

Category 1: Required detention (with exceptions)

- *Aliens in Expedited Removal.* Arriving aliens at Ports-of-Entry who are inadmissible under INA §212(a)(6)(C) or 212(a)(7) are subject to expedited removal proceedings pursuant to INA §235(b)(1). Any alien placed into expedited removal must be detained until removed from the United States and may not be released from detention unless (1) parole is required to meet a medical emergency or legitimate law enforcement objective, or (2) the alien is referred for a full removal proceeding under §240 (for example, upon a finding of "credible fear of persecution"). Although parole is discretionary in all cases where it is available, it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community. See INA §§235(b)(1), 8 C.F.R. §235.3.

  Aliens who are ordered removed under expedited removal and who make an unverified claim to United States citizenship, or to lawful permanent

resident, refugee, or asylee status, are referred to an IJ for a status review under 8 C.F.R. §235.3(b)(5)(iv). Such aliens must be detained pending this review, unless parole is required to meet a medical emergency or legitimate law enforcement objective.

If there is insufficient detention space to detain an alien in expedited removal who arrived at a land border Port-of-Entry and claims a fear of persecution unrelated to Canada or Mexico, that alien may be required to wait in Canada or Mexico pending a final determination of his or her asylum claim. If an alien expresses a fear of persecution related to Canada or Mexico, the alien must be detained for proceedings and may not be required to wait in that country for a determination of the claim.

Aliens subject to expedited removal who arrive at a land border Port-of-Entry, but do not claim lawful status in the United States or a fear of persecution, should be processed immediately and detained until removed. These aliens should not be required to wait in Mexico or Canada pending the issuance of an expedited removal order.

The INS may permit an alien in expedited removal to withdraw his or her application for admission.

Note that the INS maintains approximately 1,100 User Fee beds, which are funded by the User Fee Account. The INS can only use these beds for aliens arrested in support of airport operations.

B. Aliens in Proceedings: INA §240 (Removal), §238 (Expedited Removal of Criminal Aliens), Former INA §236 (Exclusion), and Former INA §242 (Deportation).

1. Category 1: Required detention (with exceptions)

- *Aliens subject to required detention in removal and deportation proceedings.* Pursuant to INA §236(c), the INS must take into custody all aliens who are chargeable as terrorists, and virtually all aliens who are chargeable as criminals, upon their release from criminal incarceration or custody. §236(c) does *not* apply to the following groups of aliens who are removable as criminals: (a) aliens who are removable under §237 for a single crime involving moral turpitude, if they were sentenced to less than a year; (b) aliens who are removable under §237 for a conviction for high-speed flight from an immigration checkpoint (18 U.S.C. §758); and (c) aliens who are removable under §237 for crimes relating to domestic violence, stalking, and the abuse or neglect of children.

  §236(c) applies to aliens in both removal proceedings under §240 and deportation proceedings under former §242. Therefore, under §236(c) the INS must continue to detain aliens who are described in that section (by their §237 equivalents) if (a) they were previously taken into custody while in deportation proceedings (i.e., charged under §241 in proceedings commenced prior to April 1, 1997) and (b) they are still in custody upon the expiration of the TPCR. Note that current §236(c) does *not* apply to aliens in exclusion proceedings under former §236.

  Once in INS custody, the alien may be released during proceedings only if the Attorney General determines that it is necessary to protect a witness, a person cooperating with an investigation, or a family member of such a person. To be considered for release in the exercise of discretion, the alien must also demonstrate that release would not pose a danger to persons or property and that the alien

does not pose a flight risk. See the requirements set forth at INA §236(c)(2).

- *Aliens with aggravated felony convictions in exclusion proceedings.* The INS must detain any alien in exclusion proceedings under former §236 (i.e., charged under §212 in proceedings commenced prior to April 1, 1997) who has been convicted of an aggravated felony, as *currently* defined under INA §101(a)(43). The INS may not parole such an alien during exclusion proceedings. Note that the expiration of the TPCR has no effect on these aliens since the TPCR did not apply to them.

2. Category 2: High Priority

- Aliens removable on security and related grounds, if not subject to required detention.
- Other criminal aliens not subject to required detention.
- Aliens who are a danger to the community or a flight risk, if not subject to required detention.
- Aliens whose detention is essential for border enforcement but are not subject to required detention.
- Aliens engaged in alien smuggling, if not subject to required detention.

3. Category 3: Medium Priority

- Inadmissible, non-criminal arriving aliens who are not in expedited removal proceedings and are not subject to required detention.
- Aliens who have committed fraud before the INS, if not subject to required detention.

- Aliens apprehended at the worksite who have committed fraud in obtaining employment, if not subject to required detention.

4. Category 4: Low Priority

- Other removable aliens, if not subject to required detention.
- Aliens originally placed in expedited removal who have been referred for a full removal proceeding under §240 upon a finding of a "credible fear of persecution." See the discussion at section A.1 above regarding the INS policy favoring release.

C. Aliens with Final Orders of Removal, Deportation, or Exclusion.

1. Category 1: Required detention (with exceptions)

- *All aliens who have final orders of removal and all aliens who have final orders of deportation and are subject to required detention.* This category includes all aliens ordered removed under revised §240, whether or not they are terrorists or criminals, and all criminal aliens ordered removed under revised §238. It also includes all terrorist and criminal aliens ordered deported under former §242 if subject to required detention under §236(c).

  Revised INA §241(a) requires the INS to remove within 90 days any of the aliens in this category. The alien may not be released during this 90-day period. See INA §241(a)(2).

  Aliens whom INS is unable to remove within 90 days should be released under an order of supervision. See INA §241(a)(3). However, the INS may continue to detain certain aliens, including, among others, those who are inadmissible on any ground; deportable or removable on criminal or security

grounds; dangerous; or flight risks. See INA §241(a)(6).

- *Aliens with final orders under expedited removal.* The INS must detain aliens who have been issued final orders under expedited removal (revised §235(b)(1)) on grounds of being inadmissible under INA §212(a)(6)(C) or §212(a)(7). Pending immediate removal, the INS must detain such an alien. However, the INS may stay the removal of such an alien if removal is not practicable or proper, or if the alien is needed to testify in a criminal prosecution. See INA §241(c)(2).

- Aliens convicted of aggravated felonies with final orders of exclusion. The INS must continue to detain until removal any alien with a final order of exclusion (i.e., charged under section 212 in proceedings commence prior to April 1, 1997) who has been convicted of an aggravated felony, as *currently* defined under INA §101(a)(43). The INS may not parole such an alien unless the alien is determined to be unremovable pursuant to old INA §236(e)(2) and the alien meets the criteria for release under that provision. See former INA §236(e) (as designated prior to April 1, 1997) and the Mariel Cuban parole regulations at 8 C.F.R. §§212.12 and 212.13.

2. Category 2: High Priority

- *Aliens with final orders of deportation (if not terrorists or criminals subject to required detention under §238(c) and §241(a)) or exclusion (if not aggravated felons).* Aliens placed into proceedings *prior* to April 1, 1997, who were or are ordered deported or excluded, are only subject to required

- detention if terrorists or convicted of certain crimes. See part C.1 above. Otherwise, they are

subject to discretionary detention and, once they have a final order of deportation or exclusion, their detention should ordinarily be a high priority.

Please note that the 6-month rule of former INA § 242(c) and (d), which regards detention and release, continues to apply to these non-terrorists and non-criminal aliens with final orders of deportation. Non-aggravated felon aliens with final orders of exclusion may be paroled from custody to the discretion of the INS.

IV. GENERAL DIRECTIONS

A. Category 1

- Aliens subject to required detention shall have first priority for all available[1] INS detention space.

- With the exceptions noted above, category 1 aliens shall be detained.

- Each Region should ensure that it maintains sufficient non-criminal detention space to provide basic support for its full spectrum of law enforcement objectives. However, with the exception of this basic level of non-criminal detention space, each Region, District,

- and Sector must seek to comply with the detention priorities outlined above.

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[1] Available detention space means space that is both available and suitable for the detention of the alien in question. For example, an alien terrorist sūbject to required detention would have first priority for all INS beds suitable for the detention of terrorists. No alien should be detained in an INS bed unsuitable for that alien's detention (regardless of the detention category).

If a category 1 alien comes into INS custody but no detention space is available locally, the responsible office should pursue the following options in rank order:

1) acquire additional detention space locally securing funds from the Region if necessary;

2) transfer the alien to another INS District or Region where space or funding is available;

3) release an alien in local INS custody who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien; or

4) release an alien in INS custody in another District who is not subject to required detention (i.e., an alien in category 2, 3, or 4) to make space for the category 1 alien.

- If a category 1 alien comes into INS custody when all INS criminal beds nationwide (i.e., beds not reserved for juveniles, User Fee operations, or non-criminal detention) are occupied by other category 1 aliens and there are no additional detention funds available, the responsible office should contact its Regional Director to arrange for the release of a lower-priority category 1 alien in order to permit the detention of a higher-priority category 1 alien.

- INA § 236(c) does not require the INS to arrest any alien who is described in that section but was released from criminal incarceration or custody previously. However, if the INS later encounters such an alien in a non-custodial setting and elects to initiate immigration proceedings, the alien is subject to required detention.

- INA § 236(c) does not require the INS to re-arrest any alien who is described in that section but was released from INS custody under the TPCR.

However, the INS may re-arrest such an alien under INA § 236(b) if conditions have changed or if circumstances otherwise warrant.

B. Categories 2, 3, and 4

- Aliens in categories 2, 3, or 4 should generally be detained according to rank, higher priorities before lower priorities. Exceptions to this general rule may be made as follows:

  1) The District Director or Sector Chief may make an exception in individual cases if local circumstances require.

  2) The Regional Director, with the concurrence of the Executive Associate Commissioner for Field Operations, may make an exception to accommodate special regional enforcement initiatives.

  3) The Executive Associate Commissioner for Field Operations may make an exception to accommodate special national enforcement initiatives or to address an emergency.

C. Juvenile Aliens

- This Detention Use Policy does not apply to juvenile aliens or juvenile detention space. Please refer to the instructions for the detention and release of juvenile aliens issued previously.

[LOGO]

LIETUVOS RESPUBLIKOS
AMBASADA
VAŠINGTONAS

EMBASSY OF THE
REPUBLIC OF
LITHUANIA
WASHINGTON, D.C.

October 26, 1998
No. 3873

Mr. John J. Foadre
Attorney-Adviser, Consuler Affairs
The US Department of State

cc: Mr. James English, INS

Dear Mr. Foadre:

Following our meeting on September 8, 1998 at the Embassy of Lithuania in Washington, DC, I would like to bring to your attention the position of the Ministry of Foreign Affairs of Lithuania regarding US request to issue travel documents for Mr. Kestutis Zadvydas, resident of the US.

According to the Law on Citizenship of the Republic of Lithuania, the term "citizenship" is used to indicate the status of being a citizen, as the term "nationality" is perceived as meaning "belonging ethnically to a certain nation", and "nationality" cannot be used as a basis for determining citizenship. According to the law of the Republic of Lithuania, individuals of different nationalities might be citizens of Lithuania. And visa versa – not always ethnic Lithuanians are citizens of Lithuania. According to the norms of the International Law, countries commit themselves to accept deportations of their citizens and permanent residents, and not individuals of certain ethnic origin. It is essential in any case of

intended deportation to Lithuania, whether an individual under question is a citizen or permanent resident of Lithuania, or not, i. e. whether he/she is included into the register of residents of Lithuania, has relevant identification papers.

According to Lithuania law Kestutis Zadvydas can become a citizen of Lithuania only if he expresses his will to be become a citizen in the form of handing in to certain Lithuanian diplomatic or consular office a request and certain required documents, proving that his parents were citizens of the Republic of Lithuania prior to the Second World War.

Sincerely,

/s/ Dalia Grybauskaite
Dalia Grybauskaite
Minister

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
HALE BOGGS FEDERAL BUILDING
501 MAGAZINE STREET, SUITE 318
NEW ORLEANS, LOUISIANA 70130

Virginia L. Schlueter — ***TOLL FREE 1-(800) 296-4046***
Federal Public Defender — ***TELEPHONE (504) 589-2468***
Robert F. Barnard — ***FAX (504) 589-2556***
John H. Craft
Roma A. Kent
Gary V. Schwabe, Jr.
Claude J. Kelly, III
Valerie Welz Jusselin
Assistant Federal Public Defenders

March 19, 1999

Ms. Laura A. Smith
Trial Attorney, Civil Division
Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Re: Kestutis Zadvydas v. Underdown
U.S.C.A. No. 97-31345 (5th Cir. Pending), Appeal From No. 96-CV-810-L(6), (E.D.La. Nov. 26, 1997)

Dear Ms. Smith:

Please be advised that I have sent Mr. Zadvydas a copy of your March 10, 1999, letter that states that he may apply for Lithuanian citizenship. I have also read the letter to him over the telephone. As you know, Mr. Zadvydas has, as per the court order, stayed in contact with the Immigration and Naturalization Service (INS) in Houston. As a result, I told Mr. Zadvydas that he should bring your letter to the attention of INS there and that he needs to

determine where the nearest Lithuania Consulate is located.

Also, you refer in your letter to a separate letter from the Lithuanian Embassy referencing applying for citizenship. If you could be so kind as to provide me with a copy of that document, I will forward it to Mr. Zadvydas. If you have any forms from Lithuania, I will be glad to forward them to my client.

Sincerely,

ROBERT F. BARNARD
Assistant Federal Public Defender

RFB:lg
cc: Mr. Kestutis Zadvydas

[LOGO]

LIETUVOS RESPUBLIKOS
GENERALINIS
KONSULATAS
NIUJORKAS

CONSULATE GENERAL
OF THE REPUBLIC OF
LITHUANIA
NEW YORK

March 25, 1999
Our ref. 03-05-725

Kestutis Zadvytis
9275 Richmond Suite 101
Houston, TX 77063

Dear Kestutis Zadvytis,

Enclosed please find the forms for applying for issuance of a passport of the citizen of the Republic of Lithuania (a sample form is included). The forms must be fully filled out and returned to the General Consulate of Lithuania in *Chicago* with three (3) passport photos (2"x2" size) ("glossy or matte finish color/Black and white passport photos"). The following documents should also be included:

1. Documentation showing that you (or your parents or grandparents) were a Lithuanian citizen from February 16, 1918 till June 15, 1940. For example, interior or foreign passports issued before June 15, 1940; certificate of identification issued by the Republic of Lithuania; birth certificate if born after 1919; military service card.

2. US identification documents (copy of your Permanent resident Card).

3. If during any time you have changed your name for naturalization, marriage or other reasons, you must provide us with the appropriate documentation showing that change.

4. If you are married, your marriage sertificate [sic] must be included.

5. If you have children younger than sixteen (16), their birth certificates must be included.

Documents that are not issued in Lithuania ***must be notarized***. They will then be legalized by the Consulate.

For all documents written not in the Lithuania language, ***typed translations to the Lithuanian language must accompany them.***

420 FIFTH AVENUE TEL: 212 354 7840
NEW YORK, NY 10018 FAX: 212 354 7911

[LOGO] **U.S. Department of Justice**

Civil Division

DEK:DMM:LAS Telephone: (202) 305-0194
39-33-584

Washington, D.C. 20530

BY FEDERAL EXPRESS

April 1, 1999

Robert F. Barnard, Esq.
Federal Public Defender's Office
501 Magazine Street, Suite 318
New Orleans, LA 70130

Re: Zadvydas v. Underdown, No. 97-31345 (5th Cir. pending), *appeal from* No. 96-CV-810-L(6) (E.D. La. Nov. 26, 1997)

Dear Mr. Barnard:

Enclosed as requested in your letter of March 19, 1999, is a copy of the letter from the Embassy of the Republic of Lithuania setting forth the position of the Ministry of Foreign Affairs regarding the immigration and Naturalization Service's request for travel documents for Mr. Zadvydas.

Please contact me at (202) 305-0194 should you require any further information.

Sincerely,

/s/ Laura A. Smith
LAURA A. SMITH
Attorney
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Enclosure

[LOGO]

LIETUVOS RESPUBLIKOS
AMBASADA
VAŠINGTONAS

EMBASSY OF THE
REPUBLIC OF
LITHUANIA
WASHINGTON, D.C.

October 26, 1998
No. 3873

Mr. John J. Foadre
Attorney-Adviser, Consuler Affairs
The US Department of State

cc: Mr. James English, INS

Dear Mr. Foadre:

Following our meeting on September 8, 1998 at the Embassy of Lithuania in Washington, DC, I would like to bring to your attention the position of the Ministry of Foreign Affairs of Lithuania regarding US request to issue

travel documents for Mr. Kestutis Zadvydas, resident of the US.

According to the Law on Citizenship of the Republic of Lithuania, the term "citizenship" is used to indicate the status of being a citizen, as the term "nationality" is perceived as meaning "belonging ethnically to a certain nation", and "nationality" cannot be used as a basis for determining citizenship. According to the law of the Republic of Lithuania, individuals of different nationalities might be citizens of Lithuania. And visa versa – not always ethnic Lithuanians are citizens of Lithuania. According to the norms of the International Law, countries commit themselves to accept deportations of their citizens and permanent residents, and not individuals of certain ethnic origin. It is essential in any case of intended deportation to Lithuania, whether an individual under question is a citizen or permanent resident of Lithuania, or not, i. e. whether he/she is included into the register of residents of Lithuania, has relevant identification papers.

According to Lithuania law Kestutis Zadvydas can become a citizen of Lithuania only if he expresses his will be become a citizen in the form of handing in to certain Lithuanian diplomatic or consular office a request and certain required documents, proving that his parents were citizens of the Republic of Lithuania prior to the Second World War.

Sincerely,

/s/ Dalia Grybauskaite
Dalia Grybauskaite
Minister

MCDERMOTT, WILL & EMERY

May 10, 1999

Mr. Robert Barnard
Federal Public Defender

Thank you for your fax letter, dated April 27, 1999.

I am a Lithuanian lawyer working in the American law firm of McDermott Will & Emery. Among other areas of law, I also practice in the area of Lithuanian immigration law.

I understand that in an October 26, 1998 letter, the Embassy of the Republic of Lithuania stated that:

> According to Lithuanian law Kestutis Zadvydas can become a citizen of Lithuania only if he expresses his will to become a citizen in the form of handing in to certain Lithuanian diplomatic or consular office a request and certain required documents, proving that his parents were citizens of the Republic of Lithuania prior to the Second World War.

You have asked me to address whether the documents which you sent to me are sufficient to prove that Mr. Kestutis Zadvydas' parents were citizens of Lithuania prior to the Second World War, as required by the Lithuanian Embassy. I have examined the following documents:

1. Mr. Zadvydas' mother's baptismal certificate

2. An affidavit of his father stating that he was born in Mazeikial, Lithuania

3. The visa application of Mr. Zadvydas' father to enter the United States

4. Documents recording Mr. Zadvydas' parents marriage which include notarized statements from both parents.

The documents sent by you might be not sufficient to prove the citizenship of K. Zadvydas' parents due to the following reasons:

(1) They do not evidence that K. Zadvydas' mother born on October 31, 1919, was a citizen of the Republic of Lithuania. Moreover, they show that at her birth, the territory she was born in (Memel) belonged to Germany.

(2) None of the documents sent by you contain evidence of the citizenship of S. Zadvydas except for the Sworn Statement of O. Zadvydas and S. Zadvydas notarized on November 15, 1955. The Sworn Statement made by the parents of K. Zadvydas of their own origin (in the absence of other evidence) would, most likely, be not sufficient grounds for the granting of the citizenship by the Migration Department. The criminal record of K. Zadvydas would, most probably, be taken into account.

Yours sincerely,

/s/ Eugenija Sutkiene

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF LOUISIANA
HALE BOGGS FEDERAL BUILDING
501 MAGAZINE STREET, SUITE 313
NEW ORLEANS, LOUISIANA 70130

[Names And Addresses Omitted In Printing]

May 11, 1999

Ms. Lynne Underdown
District Director
Immigration and Naturalization Services
701 Loyola Street, Room T8011
New Orleans, Louisiana 70113

RE: Kestutis Zadvydas

Dear Ms. Underdown:

I am writing to request that you reconsider your prior decision denying release from custody for my client, Kestutis Zadvydas. Developments in this case over the past eighteen months demonstrate that Mr. Zadvydas is neither a danger to the community nor a flight risk, and thus is eligible for release pursuant to the factors identified in 8 U.S.C. § 241, 8 C.F.R. §§ 241.4 and 241.5, the April 30, 1999, Statement of Commissioner Meissner regarding mandatory review of individuals in indefinite detention (Underdown Letter (hereinafter "UL") Exhibit U.L. A) and the February 3, 1999 memorandum of Executive Associate Commissioner Michael Pearson. (Exhibit U.L. B).

Pursuant to the February 3, 1999, Pearson memo, individuals such as Mr. Zadvydas who cannot be removed because immediate repatriation is not possible

are now subject to consideration for release pursuant to the factors identified in 8 C.F.R. §241.4.

At the time of your office's original decision, it was found that Mr. Zadvydas did not qualify for release because he had failed to establish that he was neither a danger to the community nor a flight risk. Subsequent to that decision, a United States District Court Judge ordered that Mr. Zadvydas be released. The INS proposed six conditions for this release: 1) that a $5000 bond be posted; 2) that Mr. Zadvydas be required to provide evidence of residence or of a family sponsor; 3) that he also be required to provide evidence of employment; 4) that he have medical insurance; 5) that he undergo a psychiatric evaluation; and 6) that, upon release, he be required to report monthly to the INS. In ordering the release of Mr. Zadvydas, the District Court adopted all of the INS' conditions as proposed, with the only modification being a bond of $2000.

Mr. Zadvydas complied with all of these conditions and thus was released from INS custody on or about November 21, 1997. Since that date, he has continued to comply with all conditions. Each of these conditions, as well as other relevant information concerning his conduct subsequent to his release, is discussed below.

The psychiatric evaluation requested as a condition by the INS was performed on or about August 19, 1997, prior to Mr. Zadvydas' release. The psychiatrist who evaluated Mr. Zadvydas was one selected by the INS. Pursuant to his evaluation, the psychiatrist determined that Mr. Zadvydas was neither homicidal nor suicidal. He was also found to have no serious psychiatric problems. His

Global Assessment of Functioning (GAF), which measures an individual's current ability to function in numerous environments, including the home, workplace and community, was found to be a 90. This level of functioning placed Mr. Zadvydas in satisfactory range. Finally, and significantly, the psychiatrist found that Mr. Zadvydas was not at that time a danger to himself or to others. (Exhibit U.L. C).

Prior to his release from custody, Mr. Zadvydas posted the required $2000.00 bond. His brother-in-law, Juan Ferreiro, agreed to be his sponsor and, as such, provided a job for him as a janitor at his business. Mr. Zadvydas continues to be employed at this business, but has since been promoted to the position of floor manager/cashier. With his promotion he also received a raise, from an income of $250.00 per week to that of $400.00 per week. His employer reports that he is dependable and hard-working; that he arrives to work early and completes all jobs that need to be done; and that he is vital to the business. (Exhibit U.L. D).

Mr. Zadvydas has now been living in Houston, Texas under supervised release for almost eighteen months. During that time he has reported faithfully to the Houston INS office as required. Originally, he was ordered to report every four months. At his last report date, he was told that he did not have to report again for seven months. Mr. Zadvydas has not missed any of these report dates.

During the last eighteen months, Mr. Zadvydas has also renewed his ties to the community. He sees his daughter on an almost daily basis and is very active in her life.

(Exhibit U.L. E). He is also involved in his church, attending service on a weekly basis. (Exhibit U.L. F).

The events of the past eighteen months, when coupled with the evidence already in Mr. Zadvydas' file, prove that Mr. Zadvydas has now met his burden of demonstrating that he is neither a danger to the community nor a flight risk.

The fact that Mr. Zadvydas is currently released under supervision pursuant to the order of the District Court does not deprive your office of authority to determine his continued eligibility for supervised release. Nothing in the statute or the regulations requires that an alien be detained for the INS to consider his custody status. Rather, 8 C.F.R. §236.1(D) (2) (ii) (1998) specifically provides that "[a]fter an order becomes administratively final, the respondent may request review by the district director of the conditions of his or her release." This regulation makes no mention that an individual must be physically detained in order to make such a request; to the contrary, it indicates that an alien ordered released can request review of the conditions placed upon his or her release. The INS can also review the custody status. In fact, in Mr. Zadvydas' case, the INS performed precisely such a review when one of its agents changed his reporting requirement from the original four month period to a period of seven months. Thus, under this authority you are also not precluded from determining Mr. Zaadvydas' [sic] eligibility for continued supervised release, notwithstanding the fact that he is currently not in detention.

For all of the reasons explained above, we ask that you reconsider your earlier denial of release to Mr. Zadvydas in light of his dramatically changed circumstances. We look forward to your prompt reply to this request. Please feel free to call if you have any questions.

Sincerely,

/s/ Robert F. Barnard
ROBERT F. BARNARD
Assistant Federal Public Defender
RFB/mbs
attachments
cc: Laura A. Smith
Office of Immigration Litigation

EXHIBIT U.L. "A"

U.S. Department of Justice
IMMIGRATION AND NATURALIZATION SERVICE

STATEMENT 4/30/99

New Mandatory Review Policy For INS Long-Term Detainees

Doris Meissner
Commissioner,
Immigration and Naturalization Service

Effective immediately, all INS district offices have been instructed to perform reviews of individuals who have final orders of removal but whose immediate repatriation is not possible. These reviews will determine eligibility for release of these individuals under authorization provided in the changes in the 1996 immigration law. The mandatory reviews will occur before the expiration of the 90-day removal period. Individuals who are not found amenable to release following the 90-day review will have their cases reviewed every six months thereafter.

Previous INS policy recognized that district directors had the authority to conduct such case reviews. The reviews have now been made mandatory and will be conducted in a regularly scheduled manner.

INS' priority is keeping our communities safe, and no one will be released if he or she is deemed to pose a threat to public safety. However, every individual in long-term detention has a right at any time to request a

review of his or her case, based on a change of circumstances, to determine if release is appropriate. Release decisions will consider criminal and immigration violations, history of violence while incarcerated, evidence of rehabilitation, and ties to the community.

Furthermore, in order to achieve fairness and consistency, INS will put into place uniform, standardized and transparent procedures for the reviews.

INS is committed to ensuring fair and consistent review process that is conducted in a timely, methodical manner. by establishing regularly scheduled reviews, individuals in long-term detention and their families will know when their cases will be reviewed, as well as the procedures for those reviews.

We will continue to work with all parties in the communities we serve to ensure their safety and to further open communication as well as active participation with INS as the agency continues to forge a framework for how to effectively deal with the difficult issue of long-term detention.

- INS -

Prepared by the Office of Public Affairs (202) 514-2648 Internet: www.ins.usdoj.gov

EXHIBIT U.L. "B"

76 INTERPRETER RELEASES March 15, 1999

Appendix II

[seal]

U.S. Department Of Justice
Immigration and Naturalization Service

HQCOU90/16.51

435 I Street NW
Washington, DC 24534

Office of the Executive Associate Coordinator

February 3, 1999

MEMORANDUM FOR REGIONAL DIRECTORS

FROM: Michael A. Pearson /s/ Michael A. Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: *Detention Procedures for Aliens Whose Immediate Repartriation Is Not Possible or [illegible]*

This memorandum clarifies the authority of District Directors to make release decisions and emphasizes the need to provide a review of administratively final order detention cases both before and after the expiration of the mandatory 90 day detention period at § 241(a)(2) of the Immigration and Nationality Act (INA).

The District Director is required to review every administratively final order removal case before the ninety (90) day removal period mandated by § 241(a)(1) expires. 8 C.F.R. § 241.4 gives the District Director the

authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

The District Director cannot delegate the authority to render the ultimate custody or release decision beyond those directly responsible for detention within his district or Service Processing Center (SPC). Such individuals may include the Deputy District Director, the Assistant Director for Detention, the Officer in Charge (OIC) of a detention center, or persons acting in such capacities. These persons must be specifically designated by the District Directors.

Although the District Director cannot relinquish his decision-making authority, he may utilize various methods to assist in reaching a determination. For example, he may designate an individual or group of individuals to review the alien file and obtain any other relevant information. To the extent Districts have a high volume of past order cases, the District Director may also request detail assistance from other districts, the region and/or headquarters for the purpose of conducting custody

reviews. The District Director may use information obtained by local staff or detainees to make his custody decision. Detail assistance may be coordinated through John Castro, at Headquarters Detention and Deportation.

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

When an alien is released pursuant to 8 C.F.R. § 241.4 under an order of supervision, the order of supervision must specify the applicable conditions of supervision. In addition, the order of supervision must be signed by one of the parties authorized in 8 C.F.R. § 241.4.

Any alien described in 8 C.F.R. § 241.4(a), may be returned to custody subsequent to release under an order of supervision if such alien violates any of the conditions of the order of supervision. Any alien described in 8 C.F.R. § 241.4(b) who violates the conditions of the order of supervision is subject to the penalties described in § 243(b) of the INA.

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(ii), the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have

his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. *See* 8 C.F.R. § 241.4.

> 8 C.F.R. § 241.4 Continued detention beyond the removal period.
>
> (a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under § 212(a) of the Act or removable under § 237(a)(I)(C), 237(a)(I)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:
>
> (1) the nature and seriousness of the alien's criminal conviction;
>
> (2) Other criminal history;
>
> (3) Sentence(s) imposed and time actually served;
>
> (4) History of failures to appear for court (defaults);
>
> (5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history.

(b) Continuation of custody for other aliens. Any alien removable under any section of the Act other than § 212(a), 237(a)(I)(C), 237(a)(2), or 237(a)(4) may be detained beyond the removal period, in the discretion of the district director, unless the alien demonstrates to the satisfaction of the district director that he or she is likely to comply with the removal order and is not a risk to the community.

Note: these instructions also apply to criminal alien deportation cases under former INA § 242 where the aliens are subject to required detention under current INA § 235(a). *See* October 7, 1998 memorandum entitled *INS Detention Use Policy*.

EXHIBIT U.L. "C"

Family History. Denies mental illness in the family. Father had a drinking problem, no suicide in the family.

Drug/Alcohol History: He claims he drinks occasionally. Had cocaine habit, that is the reason he went to jail.

Social/Person History: Father died 25 years ago of heart attack. Mother living in New York. All of his family live in New York. He claims he has 3 brothers. Patient is a twin. Had 4 sisters: Patient is the middle child in the family. He claims he gets along well with brothers and sisters. Wife lives in Houston and works for the city of Houston. He has a 17 year old daughter. He claims he talks to his family and they write him letters. His wife lives in Houston with his daughter.

Criminal History: Had been in jail before. He said he was 17 years old when he committed armed robbery. He stated that he would not do it anymore.

Sexual History: He said he was physically abused by father but no nightmares. No sexual abuse while growing up.

Mental Status Examination: During interview patient is wearing tangerine uniform, hand cuffed and in leg chains. Poor eye contact, no abnormal gait, no psychomotor hyperactivities, speech coherent and relevant. No lapse of association. He was vocal about his condition. He does not have any country. He is stressed out about what is going on with him in prison. He wants to go home to his family in Houston so that he will be together with his wife and daughter. Mood depressed, affect sad. Not Homicidal, not suicidal. He does not sleep good because

of his condition in jail. He described he is in a room with many other people walking around and it is noisy. Appetite poor, he claimed he lost three and one half pounds because he can not eat the food they are giving him. He claimed he had been in St. Martinville since November 10, 1997. Denies hallucinations, not delusional during this interview. He is oriented to time, place, person and situation. Recent and remote memory fair. He was able to do simple spelling. He recalled 3 to 3 objects in 5 minutes. Similarly good serial of seven started at 93, then he stated he is not good in math. Able to name Clinton, Bush, Reagan and Carter as Presidents of the United States backward abstract thinking good, judgments, and insight good during this interview. Estimate intellectual function average intelligence. No abnormal involuntary movement during this interview. Assets of this patient: he can communicate well in English and he is physically healthy.

Diagnosis: Axis I: Adjustment Disorder with Mixed Emotional Feature

Axis II: Defer

Axis III: Defer

Axis IV: He is unemployed did not finish school, has been incarcerated.

Axis V: GAF 90

Recommendation: Individual therapy to overcome his stress and difficulty but he says he does not want to come back to talk to me because he is OK. At the present time

he is not dangerous to himself or to others during this interview.

/s/ Daniel M. Facalona 4/19/99
Daniel M. Facalona, M.D.

DML:da

EXHIBIT U.L. "D"

VERIFICATION OF EMPLOYMENT

EMPLOYEE: KESTUTIS ZADVYDAS

POSITION: FLOOR MANAGER/CASHIER

DATE OF EMPLOYMENT: 12/97 TO PRESENT

KESTUTIS ZADVYDAS IS A DEPENDABLE HARD WORKING EMPLOYEE. HE IS ALWAYS EARLY AND DOES ANYTHING THAT NEEDS TO BE DONE. HE DOES NOT MISS WORK AND GETS ALONG WELL WITH THE OTHER EMPLOYEES. HE IS A VITAL PERSON TO THE BUSINESS.

SINCERELY,

/s/ Jacqueline Chavarria
JACQUELINE CHAVARRIA
GENERAL MANAGER

EXHIBIT U.L. "E"

TO WHOM IT MAY CONCERN:

MY NAME IS LINA ZADVYDAS DAUGHTER OF KESTUTIS ZADVYDAS. EVER SINCE MY FATHER WAS RELEASED FROM INS, MY FATHER HAS BEEN HELPING ME WITH MY SCHOOL AND MY TUITION. HE'S BEEN THERE FOR WHATEVER I NEEDED. HE GIVES ME MORAL SUPPORT AS WELL. HE ALSO HELPS MY MOTHER BY GIVING HER MONEY FOR FOOD AND OTHER STUFF FOR ME. I SEE MY FATHER ALMOST EVERYDAY BECAUSE HE TAKES ME AND PICKS ME UP FROM SCHOOL.

/s/ Lina Zadvydas
Lina Zadvydas

United States Court of Appeals,
Fifth Circuit.

Kestutis ZADVYDAS, Petitioner-Appellee,

v.

Lynne UNDERDOWN; U.S. Immigration and Naturalization Service, Respondents-Appellants.

No. 97-31345.

Aug. 11, 1999.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GARWOOD, DAVIS and BARKSDALE, Circuit Judges.

GARWOOD, Circuit Judge:

Petitioner-appellee Kestutis Zadvydas (Zadvydas) applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. He alleged that since he is a stateless person and there is no possibility of effectuating his deportation to another country, his continued detention by respondents-appellants the Immigration and Naturalization Service (INS) and its district director (whose successor, Lynne Underdown, has been substituted as a party respondent-appellee) constitutes punishment without due process of law and thus violates his due process rights and international law. The district court granted the writ and ordered Zadvydas released from custody. *Zadvydas v. Caplinger*, 986 F.Supp. 1011 (E.D.La. 1997). We reverse.

Facts and Proceedings Below

Zadvydas was born in a displaced persons camp in Germany in 1948. In 1956 he immigrated with his family to America, and became a resident alien. Despite his long residence in this country, he never became a citizen.[1] Starting as a youth, Zadvydas developed an extensive criminal history. His FBI records indicate numerous arrests. In 1966 he was convicted of attempted robbery in New York. In 1974 he was again convicted in New York, this time of attempted burglary. The INS began the process of deportation in 1977, based on these two convictions. While those proceedings were pending, Zadvydas was released into the community. After a lengthy delay, Zadvydas' motion for relief from deportation under 8 U.S.C. § 1182(c) was denied on February 10, 1982. Facing a hearing before an immigration judge that year, Zadvydas disappeared. Over the next decade, the INS failed to locate Zadvydas.

In 1987, authorities in Virginia arrested Zadvydas for possessing 474 grams of cocaine with intent to distribute. According to his own testimony, Zadvydas used cocaine at that time. While on bail awaiting trial in Virginia, Zadvydas fled to Houston, Texas. After several years in Texas, Zadvydas voluntarily presented himself to Texas authorities, and he was subsequently tried in Virginia on the 1987 distribution charge. In 1992, he was convicted and sentenced to sixteen years' imprisonment, with six years suspended. After serving only two years, Virginia

---

[1] The record does not reveal whether Zadvydas ever applied for citizenship.

released him on parole. The INS promptly took him into custody and reinitiated deportation proceedings. In March 1994 the immigration judge ordered that Zadvydas should be detained without bond during the deportation process based on his history of flight from authorities. Zadvydas appealed that determination, but the Board of Immigration Appeals (BIA) affirmed the immigration judge.

In 1994 Zadvydas appeared before the immigration judge. He admitted his past criminal history, conceded deportability, and seemed to indicate that he was a German citizen. He applied for relief from deportation under 8 U.S.C. § 1182(c). In May 1994 the immigration judge denied relief from deportation and ordered Zadvydas to be deported. Zadvydas did not appeal that decision, does not challenge it here, and it has become final. The INS immediately contacted the German government to arrange for deportation. German officials, however, proved unwilling to accept Zadvydas. They took the position that under German law the mere fact Zadvydas was born on German soil did not automatically entitle him to German citizenship. The INS, while continuing to forward requests to Germany, contacted Lithuanian authorities in July 1994. The Lithuanians tersely responded that they could not accept Zadvydas since he was neither a citizen nor a permanent resident of Lithuania.

In May 1995, after the INS had forwarded to German authorities all the material they believed was necessary to establish Zadvydas' citizenship, the German authorities declined to accept Zadvydas. Referencing extensive research that they assertedly had conducted, they declared that Zadvydas was not a German citizen and

thus could not be deported to Germany. Subsequent communications with the German authorities apparently did not generate a response. Based on the fact that Zadvydas' wife is a citizen of the Dominican Republic, the INS apparently wrote Dominican authorities. No Dominican response is in the record. In October 1996, the INS again contacted Lithuania to ascertain whether Zadvydas could claim citizenship. The Lithuanian government has since responded by stating that Zadvydas, while not one of their citizens, could apply for citizenship if he could prove that both of his parents were born in Lithuania prior to 1940. In letters dated October 26, 1998, and March 25, 1999, the Lithuanian government has broadly outlined the type of documentation it would require, and stated that Zadvydas should present such materials to it.

In September 1995, Zadvydas filed the instant petition for a writ of habeas corpus under section 2241, claiming that his continued detention violated the Eighth Amendment, the due process clause, and international law. In February 1997 the magistrate judge recommended denial of Zadvydas' habeas petition. Zadvydas filed objections. In November 1997 the district court found that continued detention of Zadvydas was unconstitutional. The court rejected all of Zadvydas' challenges to his deportation and the denial of his request for relief under section 1182(c), and it further ruled that his continued detention was authorized by 8 U.S.C. former § 1252(a)(2)(B) because he had not shown "that he is not a threat to the community and that he is likely to appear at

any scheduled hearing." 986 F.Supp. at 1024.[2] However, concluding that Zadvydas was "stateless" and thus could "never be deported because there is no place to send him", the court held that Zadvydas could not be "permanently incarcerated" without violating his substantive due process rights. While the INS had procedures to review continuing detention, and Zadvydas thus could possibly be released in the future, the court discounted this possibility, finding that in practice there was "no end in sight" for Zadvydas' detention. 986 F.Supp. at 1027. The court ordered Zadvydas released under a list of conditions it generated. The INS timely appealed.[3] While this appeal has been pending, Zadvydas seems to have complied with the district court's release conditions and

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[2] Former section 1252(a)(2)(B) provided:

"The Attorney General may not release from custody any lawfully admitted alien who has been convicted of an aggravated felony, either before or after a determination of deportability, unless the alien demonstrates to the satisfaction of the Attorney General that such alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings."

The district court further observed in this connection that the INS had also interviewed Zadvydas and reviewed his file and determined not to then release him under the similar standards of the Transition Period Custody Rules pursuant to section 303(b)(3)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. 986 F.Supp. at 1024-5 n. 4. The INS had determined thereunder that Zadvydas was "a threat to security as well as a flight risk."

[3] Zadvydas has not cross-appealed.

has apparently conducted himself as a productive member of society.

Discussion

The district court found that given the uncertainty that any nation would be found that would accept Zadvydas, his detention was indefinite. It further found that such indefinite detention violated his substantive due process rights. The law, at least in this Circuit, regarding the long-term detention of excludable aliens pending deportation is clear – such detention is allowable. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). Zadvydas argues, however, that these cases can have no application to his status since he is a resident alien and thus can claim enhanced constitutional protection. He maintains that even if the government may detain an excludable alien indefinitely, it violates substantive due process to inflict such detention on a resident alien such as himself.[4] The INS argues, however,

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[4] Zadvydas also claims that his continued detention violates both international treaties and customary international law proscriptions of arbitrary detention. We do not believe that the continued detention here could be described as arbitrary. In any case, we rejected an identical international law claim in *Gisbert*. *See Gisbert*, 988 F.2d at 1448. We are unaware of any presently relevant distinction in international law between excludable and resident aliens, so for the purposes of adjudicating the application of international law *Gisbert* is directly controlling. Zadvydas' claims that his procedural due process and Eighth Amendment rights are violated by his continued detention were expressly not reached by the district court (986 F.Supp. at 1027 n. 6) and were not argued before us. We do not address them here.

that once a resident alien such as Zadvydas is concededly in adherence with procedural and substantive due process – ordered deported and that order becomes final, the resident alien may claim no greater rights than an excludable alien in like circumstances. To the extent that the circumstances of this case require us to follow their logic, we agree with the INS.

I. Preliminary Matters

As a threshold matter, we must address the question of this Court's jurisdiction. Although the INS contested the district court's jurisdiction below, it has not done so on appeal. We must nevertheless examine our own jurisdiction independently before proceeding. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1072, 137 L.Ed.2d 170 (1997). Congress has clearly indicated that it desires minimal judicial intrusion into deportation decisions. The strictest jurisdictional standard under which Zadvydas' claims could be evaluated are provided by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 309-546, which repealed the prior judicial review schemes governing immigration and substituted new provisions potentially applicable to Zadvydas. See 8 U.S.C. § 1252(g).[5] The Supreme Court has recently

[5] Section 1252(g) provides:

"(g) Exclusive Jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

construed the jurisdictional effect of section 1252(g). *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999). In *Reno*, the Court held that the enactment was not a general bar, but rather limited judicial review of a narrow class of discretionary executive actions. By the statute's terms, one of the actions immune from review is an action to "execute removal orders against any alien under this chapter." In a recent case, the Seventh Circuit has held that these provisions do not remove our jurisdiction to hear a section 2241 habeas petition challenging the validity of the statutes authorizing the detention of aliens. This is because the detention, while intimately related to efforts to deport, is not itself a decision to "execute removal orders" and thus does not implicate section 1252(g) under *Reno*. *See Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999). We agree, and find jurisdiction to hear this appeal.

We next must address the statutory regime governing Zadvydas' continued detention. Zadvydas was released into INS custody in 1994. Since that time, a flurry of statutory changes have taken place. Zadvydas' detention could be covered by one of four separate detention regimes, depending on the degree of retroactivity involved. Two of them, the rule in place when he was initially detained, see 8 U.S.C. § 1252 (1994), and the Transition Period Custody Rules authorized in IIRIRA, place the

burden on a detainee awaiting deportation to prove that he is not a danger to the community or a flight risk before being released on parole pending deportation. The third, most recent, provision – IIRIRA's permanent provision – authorizes detention but makes it discretionary beyond an initial ninety day period. *See* IIRIRA § 305(c), codified as 8 U.S.C. § 1231(a)(6), Immigration and Nationality Act (INA) § 241(a)(6).[6] From a constitutional perspective, the choice between these regimes appears to be of at most marginal import. However, the rules established by the immigration provisions of the Anti-Terrorism and Effective Death-Penalty Act (AEDPA) order mandatory detention of all aliens awaiting deportation, regardless of danger or flight risk. See AEDPA, Pub.L. 104-132 § 440(c), 110 Stat. 1214, 1277 (amending 8 U.S.C. § 1252(a)(2) to delete provisions allowing release of nondangerous non-flight-risk detainees).

The parties agree that AEDPA § 440(c) does not apply, and both maintain that this case is governed by the new section 241 established by the IIRIRA, which they argue applies to all aliens who are not "in proceedings" at its effective date. It would seem clear that Zadvydas is not in deportation proceedings – the order regarding his deportation was issued and became final long before IIRIRA's effective date, and only the physical act of deportation remains undone. Moreover, the rapid passage of IIRIRA in the immediate wake of AEDPA seems to indicate that Congress repudiated the harsh mandatory

[6] Certain classes of aliens, including criminal aliens such as Zadvydas, "may be detained beyond the [90 day] removal period." 8 U.S.C. § 1231(a)(6).

detention regime created by AEDPA for aliens whose deportation is final. To apply AEDPA to Zadvydas based solely on the accident of when proceedings against him began would seem to make little sense – there is no reason to suspect that Congress determined that aliens in custody prior to the effective date of IIRIRA were, as a class, significantly more dangerous than those subsequently taken and thus merited harsher treatment. While the statute currently is not a model of clarity[7] in respect to its retroactive application to an alien in Zadvydas'

[7] IIRIRA's retroactivity clause, section 309(c)(1), bars application of its provisions "in the case of an alien who is in exclusion or deportation proceedings before" its effective date. The statute's section dealing with retroactivity is generally phrased in the present tense. The title to the section is, for example, "Transition for Aliens in Proceedings," and the clause applies to an alien who "is in" proceedings at the effective date. The natural reading of the clause would thus seem to be that it applies only to proceedings that are pending as of the effective date. *See American-Arab*, 119 S.Ct. at 943 (defining transitional cases under section 309(c)(1) as "cases pending on the effective date of IIRIRA"). *See also id.* at 945 (referring to "§ 309(c)(1)'s general rule" that IIRIRA's provisions "do not apply to pending cases"). The problem is created by the statute's usage of "before," which might be read to imply that the statute only affects those that were free of any involvement in deportation proceedings prior to the effective date. The confusing "before" was, however, the product of what was labeled as a "technical" amendment established by the Hatch-Kennedy amendment to the H-1A Nursing Bill. See Pub.L. 104-302, 110 Stat. 3657. Nothing indicates what the goal of this amendment was, and the failure of the amendment to change the surrounding language makes its intended purpose unclear. Accordingly, we find the text ambiguous enough to merit consideration of *Chevron*, particularly in light of the seeming absurdity of a contrary result and the constitutional problems it might possibly create.

position, we find the INS' construction reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). We conclude that Zadvydas' detention is governed by the new provisions of section 241.

Because we agree with the parties that new INA section 241 applies, we will proceed to analyze the constitutional question presented under the assumption that Zadvydas will be able to obtain periodic review of his detention. Under INA § 241(a)(1) & (2), 8 U.S.C. § 1231(a)(1) & (2), the Attorney General is required to remove an alien from the United States within the "removal period," defined generally as the ninety days beginning when an order of removal becomes administratively final, when any judicial review thereof is completed, or when the alien is released from confinement (other than under an immigration process), whichever is latest, and is required to detain the alien during the removal period. If the alien is not removed within the removal period, "the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General." *Id.* § (a)(3). INA § 241(a)(6), 8 U.S.C. § 1231(a)(6) provides:

> "An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2)[8], or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community

[8] 8 U.S.C. § 1227(a)(2), INA § 237(a)(2), includes aliens, such as Zadvydas, convicted of an aggravated felony or a controlled substance violation.

> or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." (Emphasis added).

INS regulations, see 8 C.F.R. §§ 236.1(d)(2)(ii), 236.1(d)(3)(iii), 241.4 & 241.5, as explained and expounded in the February 3, 1999, "Memorandum for Regional Directors" from INS Executive Associate Commissioner Michael A. Pearson concerning "Detention Procedures for Aliens Whose Immediate Repatriation Is Not Possible or Practicable," authorize the release of such aliens when it is determined that the alien "is not a threat to the community and is likely to comply with the removal order," and further provide that the alien must be given the opportunity to so demonstrate, that every six months the District Director must "review the status of" such "aliens . . . to determine whether there has been a change in circumstances that would support a release decision," that the alien's file must be documented to show "the reasons for the custody or release decision," and that "if the alien submits a written request to have his detention status reviewed by the District Director . . . the alien may appeal the District Director's decision to the Board of Immigration Appeals."[9]

[9] The Pearson memorandum states in pertinent part:

> " . . . 8 C.F.R. § 241.4 gives the District Director the authority to make release decisions beyond the removal period based on specific criteria in the regulation as set forth below. The regulation also provides that the District Director should provide an alien with the opportunity to demonstrate by clear and convincing evidence that he is not a threat to the

The district court found that the INS did not err in determining that Zadvydas posed a danger to the

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community and is likely to comply with the removal order. The alien may be given this opportunity in writing, orally, or a combination thereof. The District Director must ensure that the file is documented with respect to the alien's opportunity to present factors in support of his release, and the reasons for the custody or release decision.

. . .

Every six months, the District Director must review the status of aliens detained beyond the removal period to determine whether there has been a change in circumstances that would support a release decision since the 90 day review. Further, the District Director should continue to make every effort to effect the alien's removal both before and after the expiration of the removal period. The file should document these efforts as well.

. . .

District Directors are advised that a detention review is subject to the provisions of 8 C.F.R. § 236.1(d)(2)(ii) if the alien submits a written request to have his detention status reviewed by the District Director. Under 8 C.F.R. § 236.1(d)(2)(iii) [sic], the alien may appeal the District Director's decision to the Board of Immigration Appeals. Where the alien has not made a written request to have his custody status reviewed, however, there is no provision for appeal of the District Director's decision to the Board of Immigration Appeals. See 8 C.F.R. § 241.4."

8 C.F.R. § 241.4(a) provides:

"(a) Continuation of custody for inadmissible or criminal aliens. The district director may continue in custody any alien inadmissible under section 212(a) of the Act or removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) of the Act, or who presents a

community and a flight risk. Should Zadvydas no longer do so, he would doubtless be released.

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significant risk of noncompliance with the order of removal, beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe, including bond in an amount sufficient to ensure the alien's appearance for removal. The district may consider, but is not limited to considering, the following factors:

(1) The nature and seriousness of the alien's criminal convictions;

(2) Other criminal history;

(3) Sentence(s) imposed and time actually served;

(4) History of failures to appear for court (defaults);

(5) Probation history;

(6) Disciplinary problems while incarcerated;

(7) Evidence of rehabilitative effort or recidivism;

(8) Equities in the United States; and

(9) Prior immigration violations and history."

The release of an alien under section 241.4 shall be under a supervision order requiring, inter alia, periodic reporting to the INS, continued efforts to obtain travel documents, advance approval of travel beyond any therein specified limits, and giving notice of change of address; a bond may also be required; and, the INS "may grant employment authorization to an alien" released under section 241.4. See C.F.R. § 241.5.

II. *Gisbert* and Excludable Aliens

Article 1, section 8, clause 4 of the Constitution vests in Congress the power to "establish an uniform Rule of Naturalization." Moreover, "[t]he exclusion of aliens is a fundamental act of national sovereignty" that "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *See United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 70 S.Ct. 309, 312, 94 L.Ed. 317 (1950). *See also Chae Chan Ping v. United States*, 130 U.S. 581, 9 S.Ct. 623, 630, 32 L.Ed. 1068 (1889) (discussing sovereignty justification). The basic source of this interest is identical regardless of whether the government seeks to exclude an alien who has not entered, or to expel an alien who has resided here. *See Fong Yue Ting v. United States*, 149 U.S. 698, 13 S.Ct. 1016, 1019, 37 L.Ed. 905 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."). When these principles are taken together, it is clear that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 628, 97 L.Ed. 956 (1953)). *See also Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952) ("It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such

matters are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference."). The power of the national government to act in the immigration sphere is thus essentially plenary.

Aliens can of course claim some constitutional protections. The language of the due process clause refers to "persons," not "citizens," and it is well established that aliens within the territory of the United States may invoke its provisions. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220 (1886); *Wong Wing v. United States*, 163 U.S. 228, 16 S.Ct. 977, 981, 41 L.Ed. 140 (1896) (illegal resident alien could not be punished by sentence to hard labor without due process of law). While the cases have drawn a line for some purposes between excludable aliens who failed to effect entry into the country unimpeded and resident aliens, in this Circuit it is clear that the former also can be considered persons entitled to protection under the 14th Amendment. *See Lynch v. Cannatella*, 810 F.2d 1363, 1375 (5th Cir. 1987) ("Excludable aliens are not non-persons."). We cannot suppose that the result in *Wong Wing* would have been different had the alien there been excludable rather than resident.

However, alien status can affect our analysis of constitutional rights. Because of their special position, certain classifications and restrictions that would be intolerable if applied to citizens are allowable when applied to resident aliens. *See, e.g., Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 740, 70 L.Ed.2d 677 (1982) (state's exclusion of resident aliens from basic governmental functions did not

violate the constitution).[10] *See also DeCanas v. Bica*, 424 U.S. 351, 96 S.Ct. 933, 47 L.Ed.2d 43 (1976). More importantly for the issue before us, courts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict. *See Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1891, 48 L.Ed.2d 478 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Indeed, the Court has accepted collateral damage to the constitutional rights of citizens as an acceptable price to pay in deference to the plenary power over aliens of the political branches of the national government. *See Kleindienst v. Mandel*, 408 U.S. 753, 92 S.Ct. 2576, 2582-84, 33 L.Ed.2d 683 (1972) (recognizing citizen audience had First Amendment interest in listening to communist agitator, but accepting government's exclusion of alien speaker despite this interest). *See also United States v. Williams*, 194 U.S. 279, 24 S.Ct. 719, 48 L.Ed. 979 (1904).

Zadvydas claims that his detention amounts to punishment without trial, and thus violates his substantive due process liberty interest. It is well established that resident aliens may not be punished in this manner. *See*

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[10] Further, "the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Mathews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 1895, 48 L.Ed.2d 478 (1976). Thus, provisions in state laws respecting aliens which would be invalid under the Fourteenth Amendment are not necessarily invalid when contained in federal legislation. *Id.* at 1893-95.

Wong Wing, 16 S.Ct. at 981. However, the *Wong Wing* court distinguished between the unconstitutional act before it – which made illegal presence in the country summarily punishable by a sentence to being "imprisoned at hard labor" for not more than a year and provided that the alien would be "thereafter removed from the United States" (emphasis added) – and detention pending deportation. "Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation." *Id.* at 980. We have clearly held that excludable aliens may be detained pending deportation without such detention constituting unconstitutional punishment, even when the aliens' country of origin indicates it will not accept their return. *See Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). *See also Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995) (en banc) (accord with *Gisbert*).

Gisbert dealt with the detention of a group of Cubans who were part of the Mariel boatlift. After detaining these aliens prior to entry – thus ensuring that they were excludable aliens – the United States decided that they should be returned to their country of origin. Castro refused to accept their return, however, and the aliens were released on immigration parole. Due to the working of the "entry fiction,"[11] the aliens retained their

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[11] The fact that, for humanitarian or administrative reasons, the government chooses to allow excludable aliens into the country while their cases are pending does not alter their status if they were initially properly detained at the border. *See, e.g., Ahrens v. Rojas*, 292 F.2d 406, 410 (5th Cir. 1961).

excludable status despite their freedom on American soil. All of the aliens in *Gisbert* then committed, and were convicted of, crimes while on parole. After their release from the criminal justice system, the aliens were detained pending deportation to prevent any further criminal acts. In *Gisbert*, as under the provisions here, there was a procedure that allowed the detained alien to be released from detention while deportation was still impractical. *See id.* at 1443 n. 11 (detailing annual review procedures that allowed release of aliens found not to present a danger to the community).

The aliens did not challenge the conditions of their confinement or the procedures used in the initial decision to deport them. They instead argued that their continued confinement constituted punishment without a criminal trial and thus violated their substantive due process rights. They emphasized the fact that in light of Castro's refusal to accept their deportation, their confinement was potentially indefinite. We rejected these arguments and held that the continued, indefinite detention of the aliens did not violate their constitutional rights. In reaching this result, we relied on the Court's decision in *Mezei*, in which it allowed the indefinite detention of an excludable alien who had been ordered permanently excluded and could find no nation to receive him. *See Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956. Drawing on the reasoning of *Mezei*, we found that detention pending deportation does not constitute punishment, since the detention could rationally be seen as a necessary byproduct of the need to expel an unwanted alien rather than a punitive decision. *Gisbert*, 988 F.2d at 1442. The continued detention of

Mariel Cubans thus did not constitute punishment without trial in violation of the aliens' substantive due process rights, even though there was no guarantee that deportation could be effectuated in the near future.

Zadvydas attempts to distinguish *Gisbert* and *Mezei* on the ground that he is a resident alien, and thus is entitled to a greater degree of substantive due process protection than the excludable aliens in those cases. Zadvydas' resident alien status surely entitled him to greater procedural rights in the determination of whether he was entitled to remain in the United States than were granted the excludable aliens in those cases. However, Zadvydas does not challenge here the procedures used by the government in deciding to deport him, or the final result. His only complaint is with the detention itself. As explained in part IV below, we do not believe that the difference between excludable aliens and resident aliens mandates a radical departure from the reasoning of *Gisbert* when, as here, a final decision to deport the once resident alien has been made and stands unchallenged.

III. Permanent Confinement

The district court held that Zadvydas' detention violated his substantive due process rights because it constituted "permanent confinement" in that he "will never be deported because there is no place to send him." 986 F.Supp. at 1026, 1027. We conclude that these reasons considerably overstate the matter.

To begin with, Zadvydas may be released when it is determined that he is no longer either a threat to the

community or a flight risk, and he is entitled to automatic review of his case for this purpose every six months, with opportunity to present factors in support of his release, and, where his written application for release has been denied by the district director, he may appeal that decision to the BIA. *See* note 9, *supra*, and accompanying text. In *Barrera-Echavarria*, the en banc Ninth Circuit concluded that analogous annual INS administrative review for release under similar standards precluded characterization of the alien's detention as " 'indefinite' or 'permanent.' " 44 F.3d at 1450.[12]

Nor can it now be said with any real assurance that Zadvydas "will never be deported." To be sure, it is clear that due to an unfortunate combination of circumstances, locating a country to which Zadvydas may be deported has been and will be difficult at best; but that there is no meaningful possibility of doing so has not been clearly established. And, precisely because of the complexities involved, more time than usual will doubtless in any event be required.

The problem of deporting Zadvydas has its roots in the tortured twentieth century history of what is now Lithuania. Up until the German defeat in World War One, portions of Lithuania were located in Germany. Zadvydas' mother was born in that section of modern Lithuania – then known as the Memel region, now called Klaipeda – in 1919. Six years earlier (according to his own

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[12] We also note that at a certain point – which Zadvydas may be approaching – age alone would likely weigh heavily against an INS finding of continued danger to the community or flight risk.

account in an affidavit prepared to secure his post-war immigration to America), Zadvydas' father had been born in Mazeikiai, which is located on the Baltic coast outside of the disputed Memel region and thus would presumably have been under Russian control at the time of his birth. As part of the Versailles Treaty, Germany ceded the Memel region to the Allies. Lithuania, having renewed its existence as an independent state, successfully laid claim to the area and occupied it in 1923. At that point, Zadvydas' mother and father presumably would both have been Lithuanian citizens, since they were apparently born within the resurrected nation's current borders.

However, in 1939 Germany issued an ultimatum to Lithuania demanding the return of the Memel region, referencing the alleged plight of ethnic Germans under Lithuanian rule. The territory was then handed back to Germany, and (if she was still living in the region) Zadvydas' mother then would have become a subject of Nazi Germany. Unlucky in neighbors, Lithuania then had its independence extinguished by Stalin's 1940 invasion, which placed Zadvydas' father in the Soviet orbit (again, presuming he lived near his claimed home town at the time). *See generally* Algimantas Gureckas, Lithuania's Boundaries and Territorial Claims Between Lithuania and Neighboring States, 12 N.Y.L. Sch. J. Int'l & Comp. L. 107 (1991). Hitler then invaded the Soviet Union in 1941, and Lithuania was under German occupation for most of the Second World War. Late in that conflict, the Soviet army reoccupied Lithuania. The Soviets did not reestablish the Lithuanian independence they had earlier snuffed out, and Lithuania remained a captive to Soviet tyranny until

1991. In the midst of all this, Zadvydas' parents were married in 1943. At some point, the couple moved (or fled) to Germany, where their first child was born in 1944. The family spent the immediate post-war years in displaced person camps in Germany. On Nov. 21, 1948, Zadvydas was born in one of these camps. In 1956 the family immigrated to America.

Due to these events, Zadvydas may in a sense be stateless. While born in Germany, he cannot claim German citizenship on that basis alone, because under German law citizenship hinges on blood (jus sanguinis) rather than place of birth (jus soli). Lithuania would seem to be the obvious alternative. Lithuanian sanguinis may be able to substitute for Zadvydas' birth outside of Lithuania. According to the communications from the Lithuanian government, Zadvydas can apply for Lithuanian citizenship if both his parents were born in Lithuania prior to the Soviet invasion in 1940.[13]

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[13] Lithuania's citizenship laws are apparently designed to give preference to ethnic Lithuanians over the large number of ethnically Russian immigrants who established themselves in the years of communist occupation. The requirement of proving birth of one's ancestors in Lithuanian territory neatly differentiates the two populations. *See* Ruta M. Kalvaitis, Citizenship and National Identity in the Baltic States, 16 Bos. U. Int'l L.J. 231 (1998). This seems to be merely a variant of the jus sanguinis principal. It should be noted that the blood citizenship laws that must be navigated here would appear to administratively function somewhat differently from American birth citizenship laws. Because birth alone is not sufficient, it appears that under Lithuanian practice one (or one's parents) has to affirmatively apply for citizenship. The fact that Lithuania is asserting that Zadvydas must apply for citizenship may thus not be unusual. It does seem to have caused some confusion in the communications between the INS and Germany and Lithuania. The INS continually asked for confirmation that Zadvydas was a citizen, rather than framing the matter as an application for citizenship. Given the circumstances of Zadvydas' birth, it would seem unlikely that his parents paused to put him in the national registry of either country. While perhaps understandable, this confusion may have slowed the process here.

According to their own accounts, both parents would qualify under this standard. The difficulty that has so far delayed the process seems to be the need to document this fact. There is a baptismal certificate indicating his mother's birth in the Memel region, which is now part of Lithuania.[14]

However, there is no corresponding documentation demonstrating that Zadvydas' father was born in Mazeikiai. The only evidence that has been unearthed up to this point is his affidavit upon entering the United States, which claimed birth in Lithuania.

The Lithuanian government, in letters dated October 26, 1998, and March 25, 1999, indicated that Zadvydas might apply for citizenship, but would have to personally

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[14] Zadvydas attempts to argue that the fact that at the time Zadvydas' mother was born the status of the Memel region was unsettled indicates that she could not claim Lithuanian citizenship. Nothing in the record supports this theory, and it would seem contrary to ordinary practice. *See* Restatement Third, Restatement of the Foreign Relations Law of the United States § 208, comment c; *id.* Reporters' Note 3 ("Normally, the transfer of territory from one state to another results in a corresponding change in nationality for the inhabitants of that territory"). While there is some evidence that Zadvydas's mother considered herself stateless, or German, this may not accurately track Lithuanian nationality law.

and formally request it, and present documentation of his parent's birth. The INS had previously presented most of the available documentation – the baptismal certificate and Zadvydas' father's affidavit – in its communications with Lithuania. It is not clear, however, whether these materials were examined by the Lithuanians as support for an application for citizenship, rather than as part of a claim that Zadvydas already possessed citizenship. Certainly there has been no definitive denial by Lithuania of any application for citizenship by Zadvydas. Accordingly, it is premature to assume that the Lithuanians will reject Zadvydas based on the current documentation. Even if they were to demand more reliable evidence of his father's birthplace, there is no basis on which to conclude that more cannot be uncovered. After all, it does not seem disputed that he was born in what became Lithuania. For example, a search of the public records in Mazeikiai or elsewhere (so far apparently unperformed anywhere by anyone) might prove fruitful. To be sure, such efforts may ultimately prove unsuccessful. And even if unimpeachable evidence of Lithuanian parentage is produced, there is a hint in the record that Lithuania might be able to reject Zadvydas' application based on his criminal record. However, there is no basis for finding that any ability of Zadvydas to become a Lithuanian citizen, and hence deportable there, has been definitively foreclosed.

Also, apart from Lithuania, two other potential options appear to remain unexplored. The record indicates that the German government, in a letter dated May 1995, has definitively rejected the INS' efforts to deport Zadvydas to Germany and mentioned "extensive research" establishing that he is not a German citizen. If –

as it appears – the only evidence put forth by the INS was Zadvydas' birth in Germany, this decision would seem justified under the jus sanguinis principle. However, it would seem that another argument, as yet apparently untapped, might properly be advanced to justify Zadvydas' German citizenship. Zadvydas may in fact have German blood, and thus qualify under jus sanguinis.

After World War Two, German law allowed members of ethnic German communities – some of which, such as the "Volga Germans," had been separated from Germany proper for centuries – to claim citizenship under far more lenient terms than applied to foreigners generally. *See* Note, Deutschland ist Doch ein Einwanderungsland Geworden: Proposals to Address Germany's Status as a "Land of Immigration," 30 Vand. J. Transnat'l L. 905, 916-923 (1997). Zadvydas' mother was born in the Memel region in 1919. Prior to its defeat in World War One, this region was part of Germany. It would thus seem reasonably possible that Zadvydas' mother could be considered an ethnic German – indeed, her birth documentation is in German, not Lithuanian or Polish. It lists her maiden name as Steffan, and her mother's maiden name as Jackshies. It is not obvious to us that these are non-Germanic names. Perhaps Zadvydas could apply for German citizenship claiming ethnic German ancestry.[15] Obviously, the success of such an approach is far from assured – and

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[15] There is nothing to indicate that the mother's potential German ethnicity would in any way affect parallel efforts to obtain Lithuanian citizenship. Lithuania's laws appear to be solely focused on the problem of Russian immigrants.

even if Zadvydas' ethnic status can be shown, his presence in the United States, lack of language skills, or what seems to be his father's likely un-Teutonic ethnicity might defeat such an application. But *see id.* at 923 ("Judicial interpretation and administrative application of the statutes governing naturalization of ethnic Germans have established that the threshold for proving oneself to be an ethnic German is very low.").

A final potential option, apparently completely unexplored, is to attempt to claim Russian citizenship for Zadvydas. Wherever Zadvydas' parents were born, it seems undisputed that their birthplaces would have been inside the borders of the Soviet Union at its post-war height. Russia has apparently been liberal in granting citizenship to former citizens of the Soviet Union now living outside of Russia's borders. *See* Kalvaitis, National Identity in the Baltic States, 16 Bos. U. Int'l L.J. at 240 n. 64. It is noted in an INS affidavit that Zadvydas' mother travels to Russia frequently. Before the immigration judge Zadvydas seemed to indicate that these visits were to visit family.[16] An INS letter indicates the Zadvydas's mother has a sister in Russia whom she visits every year. If Zadvydas does indeed have an aunt living in Russia, he might perhaps qualify for citizenship there. The record does not reveal the details of this apparent family relationship, nor does it contain a discussion of Russian citizenship law. Again, then, success obviously cannot be

[16] When the immigration judge asked whether Zadvydas was aware of any relatives he might have in Germany on his mother's side who she was in contact with, Zadvydas replied "no, she goes to Russia."

presumed. The point is that the record indicates that there may be some slight possibility of this, and that this possibility is apparently wholly unexplored.

As the preceding discussion indicates, the unfortunate historical context of Zadvydas' birth makes untangling his true nationality highly difficult and time consuming at best. But that does not mean impossible. Continued efforts might eventually produce a breakthrough with Lithuania – and, if required, further proof of his father's birth may ultimately be unearthed. And avenues for claiming German and Russian citizenship remain unexplored. Nor is it clear that the Dominican situation has been fully explored. While the delay here is long, it appears to be what one could expect given the tangled circumstances and inadequate documentation. Given the traditional deference we show to the other branches in matters of immigration policy, judicial intrusion should not be considered, particularly where there are reasonable avenues for parole, until there is a more definitive showing that deportation is impossible, not merely problematical, difficult, and distant. However, it is certainly no clearer here that Zadvydas "will never be deported because there is no place to send him" than it was respecting the aliens in *Gisbert*, and here, as also in *Gisbert*, 988 F.2d at 1447, the government is continuing its efforts to effect Zadvydas' removal.

IV. Substantive Due Process and Detention of a Resident Alien Validly Ordered Deported

Zadvydas argues that as a resident alien he has greater rights under these circumstances than an

excludable alien would, and thus that his current detention is a form of punishment unjustified by any criminal conviction despite the result in cases such as *Mezei* and *Gisbert* involving excludable aliens. However, there is little, if any, room for a distinction between the rights in this respect of excludable and resident aliens when their circumstances are so similar. Zadvydas' detention is currently within the core area of the government's plenary immigration power and thus does not violate substantive due process.

The differences that exist in the rights of excludable and resident aliens are not the product of some bright line division that places excludable aliens beyond the pale of constitutional scrutiny. Excludable aliens are persons, entitled to some due process, and other, constitutional protections. The fact that they are entitled to a lesser degree of procedural due process in proceedings to determine whether they may enter the country stems ultimately not from their status as such, but rather from the nature of what is asserted. An attempt to enter this country is a request for a privilege rather than an assertion of right. *See Landon v. Plasencia*, 459 U.S. 21, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982). Denial of entry is thus not a deprivation of rights subject to procedural due process, and that, coupled with our deference to the other branches, mandates that we leave it to Congress to determine the procedures to be used in adjudicating such claims. *See, e.g., Knauff*, 70 S.Ct. at 313 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). In practice, this determination may foreclose most constitutional challenges on behalf of excludable aliens and create the

impression that they have no constitutional rights. They have no procedural rights with regard to their entry, and most of their substantive rights will be constrained by the government's need to control immigration. *See, e.g., Gisbert*, 988 F.2d at 1448. Since many will never enter the country or will do so only briefly, they will have little opportunity to assert *Yick Wo*-type rights in matters unconnected to the plenary power. However, to the extent that their substantive rights are infringed – either during the immigration process or while they are on parole subject to the entry fiction – in a manner that cannot be connected to the immigration power, they may assert such rights. *See Lynch*, 810 F.2d at 1374-75 (excludable aliens are persons, and thus allowed to bring suit against allegedly brutal government agents since "we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment").

Resident aliens, by virtue of their presence here, develop an interest in remaining that, to a certain extent, entitles them to procedural due process before they may be removed from this country. *See, e.g., Landon*, 103 S.Ct. at 329 (in a discussion limited to procedural due process rights, noting "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation [citations], and, . . . we developed the rule that a continuously present

permanent resident alien has a right to due process in such a situation.").[17]

However, the fact that resident alien status entitles one to due process respecting the decision to deport does not mean that the plenary power concept is extinguished. On the contrary, the needs of the government are taken into account in evaluating such claims and the standard for evaluating procedures is thus lower than would be expected in analyzing the rights of a citizen with a like interest. *See Landon*, 103 S.Ct. at 330 (resident alien who has not severed her ties to the country is entitled to due process before being removed, but in evaluating procedures "it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative"); *Galvan v. Press*, 347 U.S. 522, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (noting that while deportation of a long term resident alien is drastic measure with consequences analogous to those stemming from a criminal conviction, plenary power precedent mandates nonapplicability of the ex post facto clause); *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (deportation, despite the weighty interests involved, is a civil proceeding and not subject to the same battery of procedural protections as would govern a criminal trial); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 44 S.Ct. 54, 56, 68 L.Ed. 221 (1923) (involuntary confession admissible in deportation hearing).

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[17] Indeed, as *Landon* reflects, those rights extend to resident aliens seeking reentry after a brief trip abroad not meaningfully interruptive of the alien's continued United States residence. *Id.* 103 S.Ct. at 329-330.

Nothing in these cases suggests that a resident alien has a broadly privileged constitutional status relative to excludable aliens, or is constitutionally entitled to more favorable treatment when both the right asserted and the governmental interest are identical to those in the parallel case of an excludable alien.[18] The constitutional rights of resident aliens may certainly be affected by the plenary power. *See, e.g., Fong Yue Ting*, 13 S.Ct. at 1026 (in case involving rights of a resident alien, distinguishing *Yick Wo* on the grounds that "[t]he question there was of the power of a state over aliens continuing to reside within its jurisdiction, not of the power of the United States to put an end to their residence in the country"); *Wong Wing*, 16 S.Ct. at 981 (drawing distinction between "the power of congress to protect, by summary methods, the country from the advent of aliens . . . or to expel such if they have already found their way into our land, and unlawfully remain therein" and the decision to imprison aliens at hard labor for a term notwithstanding the ability to rapidly remove the alien from the national community). Both excludable and resident aliens have the right to be free of abuses that – while tangentially and remotely related to the immigration process – cannot be justified as in furtherance of immigration goals. *See Lynch*, 810 F.2d at

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[18] In *Landon*, the court noted that a resident alien had greater substantive rights under the immigration statutes. *See Landon*, 103 S.Ct. at 326. In *Gisbert*, we referenced this discussion of statutory treatment and concluded that resident aliens "generally are granted greater substantive rights than are excludable aliens." *Gisbert*, 988 F.2d at 1440. Nothing in this discussion can be read to imply that there is an across-the-board difference in the constitutional (as opposed to statutory or regulatory) status of the two categories of aliens.

1375 (excludables); *Wong Wing*, 16 S.Ct. at 981 (resident). But both excludable and resident aliens may come in conflict with the government's sovereignty interests, and when this occurs their rights are constrained accordingly and to the same extent. As applied to detention pending removal, any here relevant constitutional distinction between excludable and resident aliens who have each been properly and finally determined to be removable would necessarily rest on a conclusion that excludable aliens are nonpersons wholly unprotected by the Constitution. However, that conclusion would conflict with our holding in *Lynch* and would require us to conclude that aliens in the position of those in *Gisbert* could be statutorily subjected to the rack and the screw, the Eighth Amendment notwithstanding.

In the circumstances presented here, the national interest in effectuating deportation is identical regardless of whether the alien was once resident or excludable. When a former resident alien is – with the adequate and unchallenged procedural due process to which his assertion of a right to remain in this country entitles him – finally ordered deported, the decision has irrevocably been made to expel him from the national community. Nothing remains but to effectuate this decision. The need to expel such an alien is identical, from a national sovereignty perspective, to the need to remove an excludable alien who has been finally and properly ordered returned to his country of origin. *See Fong Yue Ting*, 13 S.Ct. at 1022 (the "power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power"). Whether the

party to be deported is an excludable or a former resident, the United States has properly made its decision and earnestly wishes – if for no other reason than to save the cost of detention – to deport the detainee. And deportation itself is not punishment. *See INS v. Lopez-Mendoza*, 104 S.Ct. at 3483 ("The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws."); *American-Arab*, 119 S.Ct. at 947 ("Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end an ongoing violation of United States law.").

The fact that deportation cannot be immediately effectuated would not seem to recreate a distinction in the government's interest regarding excludable aliens and resident aliens. When deportation is somehow blocked, the government must worry about two things. If the alien is not detained, he may commit crimes against the general population -- crimes he would have been unable to commit had the decision to deport been effectuated. The whole point of earmarking criminal aliens for deportation or exclusion is that while we must tolerate a certain risk of recidivism from our criminal citizens, we need not be similarly generous when it comes to those who have not achieved citizenship. Their presence in this country is thus a continuing violation of the immigration laws, and if the preferred method of ending this violation is unavailable, detention may be an acceptable alternative

mechanism to achieve the ultimate goal. *See Gisbert*, 988 F.2d at 1442 (noting protection of society from potentially dangerous alien was a rational, nonpunitive purpose for detention). *See also Tran v. Caplinger*, 847 F.Supp. 469, 476 (W.D.La. 1993) ("This court can find no logical basis to conclude that the detention of a deportable alien under these circumstances is 'punishment' while the detention of an excludable alien is not").[19] In addition, when deportation becomes feasible, the alien may frustrate the process by disappearing within the country, as so many have done. If the government's efforts eventually make deportation feasible, it will be unable to effectuate its

[19] Pre-trial detention of citizens charged with a serious crime – but presumptively innocent – may be justified by the government's interest in protecting the public. *See United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 2103, 95 L.Ed.2d 697 (1987). The Court has allowed indefinite detention of a citizen as long as there has been a finding of continued danger and "some additional factor" is present. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 2080, 138 L.Ed.2d 501 (1997). In *Hendricks*, the special circumstance or additional factor was a diagnosis of pedophilia, and the Court upheld a statute that allowed indefinite detention of such persons as long as periodic review was available to certify that the detainee remained dangerous and mentally ill. *Cf. Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 1788, 118 L.Ed.2d 437 (1992) (indefinite detention of person acquitted by reason of insanity after medical diagnosis indicated he was no longer mentally ill could not be justified by danger alone). *See also Gisbert*, 988 F.2d at 1441 n. 6 (distinguishing *Foucha* on the grounds it involved a citizen and a case where "the basis for holding him in that facility had ceased to exist"). We note this only to demonstrate that detention of certain classes of persons to protect society at large is not wholly alien to our constitutional order and has been allowed in special situations when, as here, there are procedures to insure that detention must be periodically reviewed.

decision to expel if the alien has fled and gone underground in the interim. These interests are both equally potentially present regardless of whether an alien was once resident or excludable.

Once the decision is made to deport a resident alien, then, there is little, if any, difference in the government's interest in effectuating deportation of a resident alien and expulsion of an excludable alien. There is thus nothing to adequately distinguish the plenary interest from the one encountered in *Gisbert*. To the extent that Zadvydas had greater rights than the excludable aliens there, such rights were, so far as here relevant, procedural rights respecting the deportation decision, and have concededly been honored. We hold that the government may detain a resident alien based on either danger to the community or risk of flight while good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place.[20]

[20] We are aware of the recent joint opinion of five district judges in the Western District of Washington in *Binh Phan et al. v. Reno et al.* (Nos. C98-2342, C99-177C, C99-185R, C99-341WD, & C99-151L, W.D. Wash. July 9, 1999), which reaches a contrary result. We decline to follow that decision because it rests on a categorical distinction between the detention pending expulsion of deportable aliens who have been finally and properly ordered deported and the detention pending expulsion of excludable aliens who have been finally and properly ordered removed, a distinction which for these purposes we have rejected for the reasons stated in the text.

Conclusion

For the reasons stated, the judgment of the district court is

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 97-31345

KESTUTIS ZADVYDAS

Petitioner – Appellee

v.

LYNNE UNDERDOWN; US IMMIGRATION AND NATURALIZATION SERVICE

Respondents – Appellants

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

ON PETITION FOR REHEARING EN BANC

Before GARWOOD, DAVIS, and BARKSDALE,

Circuit Judges

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that eh [sic] court be polled on Rehearing En Banc (FED.R.App.P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

[OMITTED IN PRINTING]

ENTERED FOR THE COURT:
/s/
United States Circuit Judge

Supreme Court of the United States

ZADVYDAS, KESTUTIS V.
UNDERDOWN, LYNNE, ET AL.

No. 99-7791.

Oct. 10, 2000.

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The case is consolidated with No. 00-38, *Reno v. Ma*, and a total of one hour is allotted for oral argument.